(1) 88-158

No. -

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PHOENIX CANADA OIL COMPANY LIMITED,

Plaintiff-Petitioner,

v.

TEXACO PETROLEUM COMPANY, ECUADORIAN GULF OIL COMPANY and GULF OIL CORPORATION (now, by change of name, CHEVRON U.S.A. INC.),

Defendants-Respondents,

—and—

TEXACO INC.,

Defendant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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(a) Questions Presented For Review

I. This case presents the following questions under the Act of State Doctrine:

(a) Is it proper for a United States court to determine that a foreign government took a concessionaire's contractual oil production rights without compensation when (i) that government's executive and legislative acts repeatedly declared that the allegedly confiscated rights were part of undivided concession participation interests that it purchased and paid for, (ii) the purchase agreements were negotiated in part under the auspices of the United States Department of State, (iii) no act, decree or resolution of the foreign government purported to take the

oil production rights without compensation, (iv) no confiscation claim was ever lodged against the foreign government for an uncompensated taking of oil production rights, and (v) the concessionaire accepted the payments as full compensation for all transferred interests and conceded it received the compensation required by international law?

(b) May a United States Court decide sub silentio that the Act of State Doctrine is not applicable where a plaintiff expressly invokes the Doctrine and presents decrees of the foreign government concerning its oil resources and bearing directly on the primary issue tried?

(c) May a United States Court consider oral deposition testimony of two former officials of the foreign state about their government's alleged political attitudes and motivations at the time of one of the transactions?

(d) If such testimony may be considered, is it entitled to greater weight than contrary sovereign acts twelve years earlier, some sponsored by the very same persons?

II. Apart from the Act of State Doctrine, is it proper for a United States Court not to extend comity to legislative and executive acts of a foreign state concerning its oil resources and bearing directly on the subject matter of the case?

b) Parties

The parties are as set forth in the caption. Gulf Oil Corporation was acquired by Chevron Corporation and renamed Chevron U.S.A., Inc. in 1985, resulting in a change in the title of the action in 1986. Due to the automatic stay provisions of Section 362 of the Bankruptcy Code, 11 U.S.C. § 362, Texaco Inc., which had appeared in the action in the District Court, was not a party to the appeal.

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(4) Phoenix Canada Oil Co., Ltd. v. Texaco Inc., et al., 658 F. Supp. 1061 (D. Del. 1987), supplemented by Memorandum Opinion of 4/28/87 (unreported)

(5) Phoenix Canada Oil Co., Ltd. v. Texaco Inc., et al., 842 F.2d 1466 (3d Cir. 1988).

(e) Jurisdiction

(i) Review is sought of the decision and judgment of the United States Court of Appeals for the Third Circuit filed on March 30, 1988, as amended by an order dated April 26, 1988.

(ii) An order of the Court of Appeals denying Plaintiff's petition for rehearing was entered on April 26, 1988.

(iii) This Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

(f) Statutes and Regulations Involved

The case involves the following laws, regulations and other official acts of the Republic of Ecuador:

(1) Supreme Decree 925 of August 4, 1973;

(2) Supreme Decree 09 of January 2, 1974;

(3) "Acta" signed by the Republic of Ecuador, Texaco Petroleum Company and Ecuadorian Gulf Oil Company on June 14, 1974;

(4) Supreme Decree 666 of June 28, 1974;

(5) Supreme Decree 1030 of October 1, 1974;

(6) Ministerial Resolution No. 12560 of May 30, 1975;

(7) Contract signed by the Republic of Ecuador and Peat Marwick Mitchell & Co. (Latin America) in October 1975;

(8) Supreme Decree 1438 of May 17, 1977;

(9) Contract signed by the Republic of Ecuador and Ecuadorian Gulf Oil Company on May 27, 1977.

The pertinent parts of these provisions are set forth in haec verba in the appendix.

(g) Statement of the Case

Pursuant to a private contract executed July 16, 1965, Plaintiff's

predecessor transferred a portion of its undeveloped oil concession rights in Ecuador, obtained in 1961 (the "Coca" concession), to a consortium operated by Defendants, reserving an overriding royalty in any oil extracted. Commercial production of oil began in 1972. The concession proved highly successful, with the result, as the consortium had foreseen before signing the 1965 contract, that Ecuador sought to renegotiate the concession terms (A56 n.6). The renegotiations culminated in new arrangements with the government in 1973 giving back some of the generous provisions of the earlier concession agreements[1] and otherwise adapting the con-

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[1]In 1964 the consortium had acquired directly from the government another larger but much less productive concession. The two concessions were consolidated under the 1973 contract and the generally non-producing areas relinquished.

cessions to a new 1971 petroleum law. The renegotiations did not affect Defendants' royalty obligation to Plaintiff under the 1965 private contract.

In 1974, exercising an option acquired in 1973, Ecuador, through its state oil company, Compania Estatal Petrolera Ecuatoriana ("CEPE"), purchased an undivided 25% participation in the consortium's rights and assets (known in the oil business as a "working interest") for approximately $45 million.[2] Approximately 74% of the purchase price was attributable to the Coca concession oil production to which Plaintiff's royalty was attached. Although it thereby acquired 25% of Defendants' oil production and became the

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[2]The option had originally been exercisable in 1977 but was accelerated due to the turbulent events and price increases in the international oil industry in 1973-74.

third member of the consortium, CEPE, not being a party to the 1965 private contract, declined responsibility for any part of the royalty obligation to Plaintiff. Meanwhile, Defendants reduced their royalty payments to Plaintiff by that percentage. They also refused to pay Plaintiff any part of the sale proceeds. As a result, Plaintiff, whose consent to the 25% sale was neither sought nor obtained, and who was not permitted to be a party to it, saw its contractual royalty income reduced by 25% without compensation.

Then, in 1977, after a bitter confrontation with the government of Ecuador as a result of which it was almost subjected to an outright forfeiture, Gulf negotiated, under the auspices of the U.S. State Department (A461-A464, A465-A473), a sale to CEPE of its re-

maining 37.5% undivided interest in the consortium's rights and assets for approximately $115 million. This gave CEPE a 62.5% working interest, with Texaco retaining its 37.5% share. It resulted in a further uncompensated reduction of Plaintiff's royalty, as CEPE again expressly refused to assume any part of the royalty obligation, and Gulf discontinued all royalty payments and refused to pay Plaintiff any part of the sale proceeds. The 1977 Gulf sale brought the aggregate reduction of Plaintiff's royalty income to 62.5%.

Plaintiff brought this action in the District of Delaware in 1976 to recover damages from Defendants for their joint reductions of royalty payments. Jurisdiction was based on diversity of citizenship and the amount in controversy pursuant to 28 U.S.C.

§ 1332.

Plaintiff sought to either compel Defendants to continue making full royalty payments under the 1965 private contract or, alternatively, to recover, on unjust enrichment grounds, a proportionate share of the sale proceeds reflecting the relative value of its royalty. In a second breach of contract claim, Plaintiff sought recovery for underpayments of the royalty for certain specific quarters prior to the CEPE sales. Finally, in a tort claim, Plaintiff sought compensatory and punitive damages for intentional infliction of economic distress. Plaintiff filed a supplemental complaint in 1978 based upon Gulf's complete cessation of royalty payments in 1977. By a number of interim rulings, the District Court:

(1) granted summary judgment dismissing Plaintiff's contract claim for continued full royalty payments on the ground that Ecuador, by official government act, had abrogated the 1965 private contract to that extent and authorized the reductions;

(2) dismissed and then reinstated Plaintiff's contract claim for underpayments for specific quarters;[3]

(3) granted summary judgment dismissing Plaintiff's tort claim, primarily on statute of limitations grounds;

(4) rejected Defendants' act of state, forum selection clause and forum non conveniens defenses;

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[3]The dismissal was based on an act of state as interpreted by Defendants' expert. The reinstatement was based upon Plaintiff's showing, on a motion to reconsider, that the government of Ecuador had itself interpreted this act in a manner favorable to Plaintiff, thus creating an issue of fact.

(5) denied Defendants' request for summary judgment dismissing Plaintiff's alternative unjust enrichment claims; and

(6) directed a trial of the unjust enrichment and underpayment claims, all under the law of Ecuador.[4]

At trial, Plaintiff contended that by law CEPE's payments to Defendants were in both cases for the purchase of undivided working interests that had been subject to its royalty interest. It claimed it was therefore entitled to recover from Defendants a share of each payment corresponding to the relative value of its royalty and presented an unrebutted valuation analysis establish-

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[4]Neither side challenges the exposition of the Ecuadorian law of unjust enrichment as set forth in the opinion of the Court of Appeals, as amended on April 26, 1988 (A12-A13, A36-A37).

ing the amounts of those proportionate shares.

Defendants argued they had not been "enriched," based on their contention that the payments were only for "assets" and not at all for their contractual oil production rights. They maintained this position despite the express clauses of the transfer instruments and Ecuador's related executive and legislative acts providing that the payments were for undivided participations in the consortium's rights and assets.

Defendants urged that their contract rights had been "taken" or "revoked" without compensation. This confiscation claim was based on the fact that the price for CEPE's participation was, in each transaction, calculated under a formula which resulted in a lump sum equal to a corresponding percentage

of the unamortized net book value of the consortium's capital investments. Since the contract rights themselves had no book value, Defendants claimed those rights had not been paid for.

The District Court accepted Defendants' arguments and dismissed Plaintiff's unjust enrichment claims as a matter of law, based on its conclusion that Plaintiff had failed to prove that Defendants had been compensated for production rights, and that Defendants therefore had not been "enriched" (A116-A117).

Although Plaintiff expressly invoked the Act of State Doctrine and the principles of comity in regard to Ecuador's state acts declaring that the payments were for rights as well as assets, the District Court never addressed the applicability or non-applic-

ability of these important rules.

On the reinstated underpayment claim, the District Court granted judgment for Plaintiff, jointly and severally against the subsidiary companies but not the parents, for $365,479 plus prejudgment interest at the rates in force in Ecuador between 1978 and 1986.

On an appeal and cross-appeal, the Court of Appeals affirmed, except reversed the dismissal of Plaintiff's parent liability claim as it pertained to the underpayments, and it remanded the case to the District Court for further proceedings on that issue.[5] The judgment for underpayments has since

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[5]One of the findings of the Court of Appeals on this issue, that the Gulf parent, not the subsidiary, received the buyout proceeds from the 1977 sale at its home bank in Pittsburgh (A26), is obviously also relevant to that parent's potential liability for unjust enrichment.

been paid by the subsidiary companies, rendering further proceedings on that point moot.

Plaintiff's petition for rehearing of the dismissal of its unjust enrichment claims was denied (A351-A353, A38-A39). Plaintiff limits this Petition to that issue. The principal reasons given by the Court of Appeals for sustaining the District Court's dismissal of the unjust enrichment claims were:

> a) the fact that the amounts of CEPE's payments were measured by the net book value price formula which did not include any book value for rights (A13);
>
> b) a finding that "[i]t was contrary to the political philosophy of the government of Ecuador in 1974 and 1977" to pay for contract rights (A10);

c) other government actions making Defendants' operations less profitable (A4, A14); and

d) oral testimony given in 1986 depositions by two former officials of Ecuador, in power in 1974 but not 1977, regarding Defendants' contention that the government did not pay "for" oil production rights (A14).[6]

Because it affirmed on liability grounds, the Court of Appeals did not consider either Plaintiff's proof of damages or its appeal from the District Court's dictum that this proof was in-

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[6]This testimony was inconsistent with Ecuador's repeated official proclamations, including contemporaneous declarations by one of these same witnesses (A459-A460), that CEPE's payments were for rights in the concession contract as well as assets. It was also inconsistent with Defendants' acceptance of the payments on that all-inclusive basis.

sufficient because it did not break up the lump sum purchase prices into specific portions for rights and specific portions for assets (A117-A118).

The Court of Appeals made only the following vague reference to the government's repeated use of the word "rights" in its decrees and resolutions pertaining to the CEPE transactions (A13):

> Phoenix argues that both conveyances used the word "rights" to describe the subject of the contracts and, therefore, more than mere physical assets were intended to be transferred. (Emphasis supplied).

The Court of Appeals made no mention of the fact that the word "rights" was not only in the "conveyances" but was also in Ecuador's laws by which it approved the conveyances. Having thus derogated from the government's use of the term "rights" by describing it only as part of the "conveyances" (a term which does

not necessarily import an act of state) without mentioning Ecuador's duly promulgated laws (which obviously are acts of state), the Court of Appeals in effect defined the crucial acts of state in this case out of existence and then proceeded not to discuss them at all.

As a result, while selectively invoking various government acts against Plaintiff, the Court of Appeals has rendered a judgment flatly at odds with the teachings of this Court on this important rule which mandates respect for not merely some, but all relevant duly promulgated acts of foreign nations within their own territory. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

(h) Reasons For Granting The Writ

I. THE DECISION BELOW CONTRAVENED CONTROLLING ECUADORIAN LAW

A. The Pre-Trial Record

Some discussion of the pre-trial record is essential to an understanding of the context in which the payment decrees were presented. In its decision ordering a trial of Plaintiff's unjust enrichment claim (Phoenix III), the District Court, referring to its prior opinion, stated:

> even if defendants realized no "profit" on their sales to CEPE, if they were compensated for future oil production, then part of what the defendants received was gained at the expense of Plaintiff. [Phoenix II] & n.37. If defendants received compensation for future oil production -- production that had been subject to plaintiff's 1% royalty -- then they should be considered enriched by the 1% payments they otherwise would not be entitled to retain. (A196-A197).

* * *

It then reiterated:

> If, in fact, defendants received money from the sale of future oil production rights, then part of their compensation consisted of plaintiff's royalty rights (A199-A200).

As a result, the primary focus of the trial was whether Defendants had been paid for future oil production rights.

Prior to trial, the District Court had rejected Defendants' argument that the net book value formula chosen for calculating the amounts of CEPE's payments meant, ipso facto, that the payments were only for equipment and not also for rights. In Phoenix II, the District Court, citing the Magistrate's prior report, observed:

> The Magistrate concluded that the 1974 and 1977 agreements speak in terms of "rights and obligations," "rights and assets" and "Totality of its rights over the assets." (Emphasis [by court]). Even though the audits established the value of equipment and this value was utilized as the

> measure of CEPE's payment, the agreements surely referred to broader principles. (A261 n.34). (Emphasis supplied).

Then, at a pre-trial conference held on May 17, 1985 to consider Plaintiff's motion for reconsideration of certain aspects of Phoenix III, the District Court stated to Defendants' counsel:

> But the problem is, I have rejected the oil companies' position that this was payment for physical assets.
>
> MR. SHERMAN: On summary judgment.
>
> THE COURT: On summary judgment, right. So it seems to me it is all open and the parties just, as you want to litigate, I guess, that that payment is for physical assets only, so he wants to litigate his theory. I don't think you have a shred of paper that I can remember that conclusively establishes it is only for physical assets. (Emphasis supplied) (Transcript of Pre-Trial Conference held before Hon. Murray M. Schwartz, U.S.D.J., 5/17/85, p.31, referred to in Plaintiff's Open-

ing Brief to the Court of Appeals at pp.23-24).[7]

B. The Evidence At Trial

At trial, the only new evidence Defendants offered to support their "payment for equipment only" theory consisted of depositions taken in 1986 of the former Minister of Natural Resources and his legal adviser, both in power in 1974 but not 1977. Defendants offered no new documentary evidence.

In contrast, Plaintiff placed in evidence not only the transfer agreements, but a series of official acts of the Ecuadorian government, including specific laws governing the trans-

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[7]Immediately after the conference, granting Plaintiff's motion in part, the District Court deleted footnote 12 from Phoenix III (A208). That footnote had placed a cap on Plaintiff's potential damages at 1% of the payments Defendants received, irrespective of the relative value of its royalty.

actions. The District Court had not previously considered any of these laws. All of them declare that the payments were for rights as well as assets. This additional evidence consisted of the following:

(i) Decree 666 of June 28, 1974. Decree 666 was the law earmarking and authorizing the first payment of $25 million. It recited that the acquisition of 25% of "the rights and shares of the Texaco Gulf Consortium" was "a fundamental step of the petroleum policy of the National Government" (A390), and declared that its purpose was "to effect payment of the purchase of twenty-five percent of the rights and assets of the Texaco-Gulf Consortium" (A392). (Emphasis supplied). This decree was signed by

Minister Jarrin, one of the 1986 deponents, prior to promulgation by the President of Ecuador (A394).

(ii) Decree 1030 of October 1, 1974. Decree 1030, the law providing for the second payment of $10 million, after reciting Decree 666 and prior decrees, stated that this payment was the "second advance for acquisition of an amount equivalent to 25% of the rights and assets of said consortium" (A396-A397) (emphasis supplied). This decree was also signed by Minister Jarrin (A401).

(iii) The 1975 Audit Contract. This instrument, signed by the government, Defendants and the outside auditor, specified that its purpose was to "determine the price to be paid by [CEPE] for the ac-

quisition of a 25% interest that TEXACO PETROLEUM COMPANY and ECUADORIAN GULF OIL COMPANY hold in the August 6, 1973 contract for the exploration and exploitation of hydrocarbons, and the assets acquired by the Companies in carrying out that contract" (A427). This contract was authorized by Resolution 12560 of May 22, 1975 which spoke in the same terms (A402, A404-A405, A422-A423).

(iv) Decree 1438 of May 17, 1977. This law, authorizing the final payment for the 1977 purchase of Gulf's remaining interests, stated that the payment was pursuant to "the agreement for the transfer of shares and rights that correspond to Ecuadorian Gulf Oil Company in accordance with the contract of

August 6, 1973, in favor of CEPE" (A454) (emphasis supplied).

(v) Documents Incorporated in the Contract of May 27, 1977. The 1977 Transfer Agreement between Gulf and CEPE, approved by law under Decree 1437 of May 17, 1977, provided that "Gulf transfers in perpetuity in favor of CEPE the totality of its rights in the assets that correspond to it in the present CEPE/TEXACO/GULF consortium" (A433), for a price equal to "the amount of the investments not amortized made in the performance of the contract ..." (A434) (emphasis supplied). Not included in the English translation offered by Defendants, but attached to that contract as an integral part of it, was the approval of the Minister of

> Finance of "the purchase of the rights and shares in the Consortium" because the "flow of income generated by the exportation of petroleum corresponding to the percentage of [37.5%] during the foreseeable operative productivity period of exploitation of the existing oil wells, is greater than the cost to be paid to Gulf for its participation in the Petroleum Consortium" (A451-A452) (emphasis supplied).

The foregoing decrees establish as the express law of Ecuador that in both transactions CEPE purchased and paid for undivided interests in the consortium's oil production rights and all its other rights under the concession contract. The price in each case was determined as a lump sum amount equal to Defendants'

unamortized capital investments. The fundamental object of each transaction, as expressed in Decrees 666 and 1030 in 1974, and by the Finance Minister in 1977, was the purchase of a working interest in a profitable oil business. Despite the foregoing, the Court of Appeals paid no attention whatsoever to these decrees which officially declared what the payments were for.

C. The Act of State Doctrine

In Banco Nacional de Cuba v. Sabbatino, supra, the Castro government invoked the jurisdiction of the United States courts to recover the proceeds from the sale of sugar it had confiscated by decree before the shipment left Cuba. Upholding the claim despite the clear violation of international law, this Court recited what it considered to be the "classic American statement of

the act of state doctrine," as set forth in Underhill v. Hernandez, 168 U.S. 250, 252 (1897):

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves. (376 U.S. at 416).

Finding the "constitutional underpinnings" of the Act of State Doctrine in the separation of powers, Sabbatino reiterated that the Doctrine is based on

> the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere. (376 U.S. at 423).

Foreign expropriations are a particularly sensitive area where there is little agreement as to relevant international law standards and judicial intervention is dangerous. 376 U.S. at 428-437. The Court therefore ruled that

> the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law. (376 U.S. at 428).[8]

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[8]Foreign oil concession contract rights do not constitute "property" within the "Hickenlooper exception" to this rule, 22 U.S.C. § 2370(e)(2); Libyan American Oil Co. v. Socialist People's Libyan Arab Jamahirya, 482 F. Supp. 1175, 1179 (D.D.C. 1980); Occidental of Umm al Qaywayn, Inc. v. Cities Service Oil Co., 396 F. Supp. 461, 472 (W.D. La. 1975), aff'd on other grounds sub nom. Occidental of Umm Al Qaywayn, Inc. v. A Certain Cargo of Petroleum, 577 F.2d 1196 (5th Cir. 1978), cert. denied, 442 U.S. 928 (1979), and neither

(continued...)

If, therefore, a confiscatory decree is entitled to enforcement under Sabbatino, it follows a fortiori that a non-confiscatory decree, where no clear violation of international law has been demonstrated, is entitled to enforcement. As stated in the dissenting opinion in Sabbatino:

> Where a clear violation of international law is not demonstrated . . . principles of comity underlying the act of state doctrine warrant recognition and enforcement of the foreign act. (376 U.S. at 458) (emphasis supplied).

In this case, as shown, none of Ecuador's laws and decrees governing the payments purported to confiscate Defendants' contract rights. On the contrary, those decrees declared unanimous-

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[8](...continued)
court below sought to rely on it as justification for not applying the Doctrine.

ly that the lump sum considerations paid to Defendants were compensation for their contract rights as well as their assets. As stated in Ricaud v. American Metal Co., 246 U.S. 304 (1918):

> When it is made to appear that the foreign government has acted in a given way on the subject matter of the litigation, the details of such action cannot be questioned but must be accepted by our courts as a rule for their decision. (246 U.S. at 309).

The decision below that Ecuador, contrary to its express laws and other declarations, had taken or revoked oil contract rights without compensation, in effect invalidated those laws to the extent the laws declared that compensation had been paid. This was nothing less than a sub silentio departure from the clear precedents of the Act of State Doctrine which bar any question, let alone a contrary "interpretation" which

rewrites a foreign sovereign's act.

II. THE PRACTICE OF DECIDING THE APPLICABILITY OF THE ACT OF STATE DOCTRINE SUB SILENTIO, IF APPROVED IN THIS CASE, COULD LEAD TO SERIOUS MISAPPLICATION OR EROSION OF THE DOCTRINE

The District Court agreed that under the Ecuadorian legal system, a decree is a law, and a supreme decree, promulgated as law by a dictator during an absence of the legislature, takes precedence over other laws to the contrary. (A60-A61 n.11) The decrees in question were supreme decrees; as such they should have controlled the result. By any definition, they were acts of state. Sabbatino, supra, 376 U.S. at 445 n.3 (dissenting opinion); Cf. Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976). Defendants never disputed this.

Plaintiff requested that the payment decrees be given the effect plainly stated by their terms. Nevertheless, the District Court, without discussing either the decrees or the Doctrine, reached a conclusion plainly at variance with their plain language. Then, it proceeded to adjudicate Defendants' "confiscation" defense, never adjudicating Plaintiff's claim that the Act of State Doctrine precluded that defense.

If a court having jurisdiction may by this means abdicate its duty to decide issues properly presented to it, then, as this Court recognized in Sabbatino when declaring that the scope and application of the Doctrine must be determined in accordance with a single body of federal law, "the purposes behind the doctrine could be as effectively undermined as if there had be no ...

pronouncement on the subject." 376 U.S. at 424.

Erosion of the Doctrine, indeed its complete extinction, is not difficult to foresee if a court at its pleasure may disregard it when raised. In order to ensure the continued vitality of the Doctrine and to safeguard the purposes behind it, courts must be compelled to articulate a proper analysis for applying or not applying the Doctrine whenever it is raised. Only in this manner can a uniform approach to the Act of State Doctrine and its proper application be maintained.

III. THE DEPOSITIONS OF THE FORMER ECUADORIAN OFFICIALS WERE IMPROPERLY CONSIDERED

A. The Inquiry Into The Motivations Behind Ecuador's Sovereign Acts

The result below was premised largely upon deposition testimony given in 1986 by the military official who was Ecuador's Minister of Natural Resources in 1974 and his then legal advisor as to the "political philosophy" of the Ecuadorian state at that time (A10, A14).

But contrary to his deposition testimony that nothing was paid for rights, the former minister had signed several government acts, described above, which provided that the payments were for rights as well as assets. Both men were out of office by the end of 1974, and no witness was ever called who was in the government in 1977.

The depositions were nothing less than an excursion into the political motivations allegedly behind Ecuador's public acts. This court has not, until now, addressed the question of whether such an inquiry is proper. However, the Second Circuit has forbidden it under the Act of State Doctrine. Hunt v. Mobil Oil Corp., 550 F.2d 68 (2d Cir.), cert. denied, 434 U.S. 984 (1977).

In Hunt, the Court was asked to rule that the defendants had conspired to induce Libya to confiscate the plaintiff's assets. Although the validity of Libya's confiscatory decree was not directly challenged, the Court ruled that the Act of State Doctrine precluded

> judicial inquiry into "acts and conduct of Libyan officials, Libyan affairs and Libyan policies with respect to plaintiff's as well as other oil producers' properties and the underlying reasons for the Libyan government's actions." (550 F.2d at 72).

Terming such an inquiry a "Serbonian Bog," the Second Circuit observed that it was precluded not only by the Act of State Doctrine, but also, echoing Sabbatino, by "the realities of the fact finding competence of the court in an issue of far reaching national concern." 550 F.2d at 77. Accord, O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A., 830 F.2d 449, 452 (2d Cir. 1987), petition for cert. filed, 56 U.S.L.W. 3571 (U.S. Feb. 2, 1988) (No. 87-1350). The Ninth Circuit takes the same view. Clayco Petroleum Corp. v. Occidental Petroleum Corp., 712 F.2d 404, 407 (9th Cir. 1983), cert. denied, 464 U.S. 1040 (1984), and cases cited therein.

In Environmental Tectonics v. W.S. Kirkpatrick, Inc., No. 87-5328 (3d Cir. May 2, 1988), decided shortly after its opinion in this case, the Third Circuit

disagreed with Clayco, supra and Hunt, supra, holding that an inquiry into a foreign sovereign's motive is permissible, notwithstanding the Act of State Doctrine, in an antitrust case involving allegations of bribery under the Foreign Corrupt Practices Act. But however justified the Third Circuit's restrictive view of the Doctrine may or may not have been in Tectonics where important U.S. regulatory laws were involved, it should not have any bearing on this case which involves Ecuador's regulation of its natural resources and where no such countervailing considerations exist.

Our research has not disclosed any precedent for the proposition that a U.S. court may, regardless of the Act of State Doctrine, examine the motives underlying a foreign government's decrees concerning compensation for oil

concession rights. The little authority that does exist holds expressly to the contrary and requires deference to the foreign state's laws. See, e.g., Libyan American Oil Co. v. Socialist People's Libyan Arab Jamahirya, supra, 482 F. Supp. at 1179. Moreover, the courts which have dealt with such matters have uniformly held that judicial inquiries into a foreign sovereign's motivations regarding virtually any decision involving its oil are prohibited. See Clayco Petroleum Corp. v. Occidental Petroleum Corp., supra; Int'l Ass'n of Machinists and Aerospace Workers v. OPEC, 649 F.2d 1354 (9th Cir. 1981), cert. denied, 454 U.S. 1163 (1982); Hunt v. Mobil Oil Co., supra; Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92 (C.D. Cal. 1971), aff'd, 461 F.2d 1261 (9th Cir.), cert. denied, 409 U.S. 950

(1972).

The Court of Appeals in this case echoed Hunt's act of state analysis precluding examination of the foreign sovereign's motives. Approving the District Judge's comment made when excluding Plaintiff's independent breach of fiduciary duty claim, the Court of Appeals quoted as follows (A17):

> It would appear to me that the plaintiff is saying we acknowledge the validity of the decrees of the Ecuadorian government but the plaintiffs are entitled to go through the back door to attack the defendants for permitting the decrees to have been made.

In addition, in Phoenix II, the District Court expressly echoed Hunt's act of state analysis when precluding what it perceived to be a request by Plaintiff

to examine "the political machinations of Ecuador's miltary junta." (A-246).[9]

The Act of State Doctrine should by the same token have precluded the lower courts' inquiry into the Ecuadorian military government's alleged "political philosophy," which in effect concerned the validity of Ecuador's official payment decrees and resulted in an outright reversal of their plain meaning.

B. The 1986 Depositions Should Not Have Been Permitted To Overcome Ecuador's Laws And Other Official State Acts To The Contrary

Decrees 666, 1030 and 1438 and the other items listed above at pp. 31-35 were not Ecuador's only official actions

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[9]These rulings are but two examples of how both lower courts invoked an "act of state" analysis against Plaintiff while refusing to do the same in relation to Ecuador's payment decrees. Other examples are set forth in Point IV, infra.

declaring that the payments were for rights and assets. In addition:

(i) the 1973 Concession contract (Decree 925) contained similar language in Clause 52, which established the CEPE purchase option (A374-A375);

(ii) Clause 2 of Decree 925 left no doubt that oil production rights were the primary rights conferred by the contract (A373-A374);

(iii) Decree 9 of 1974, accelerating the exercise of the CEPE purchase option, contained similar language (A376-A378), as did

(iv) the 1974 Transfer Agreement (the "Acta") itself (A380-A381).

The "Acta" and Decrees 925, 666 and 1030 were all signed by former minister

Jarrin upon the advice of Arauz, his legal advisor. To the extent the depositions taken of these men in 1986 are read to say that the payments were not intended to compensate for rights, that testimony is flatly inconsistent with the instruments they authored in 1974.

In United States v. U.S. Gypsum Co., 333 U.S. 364 (1948), the district court had relied on parol testimony offered by the authors of crucial documents to reach a purported finding of fact at variance with the documents. This Court reversed, stating at p. 396:

> Where such testimony is in conflict with contemporaneous documents we can give it little weight, particularly when the crucial issues involve mixed questions of law and fact. Despite the opportunity of the trial court to appraise the credibility of the witnesses, we cannot under the circumstances of this case rule otherwise than that Finding 118 is clearly erroneous.

Each of the documents mentioned above speaks of CEPE's acquisition of and payment for undivided interests in Defendants' contract rights and equipment for a lump sum price measured by the book value formula. To the extent the former officials' deposition testimony about what they did purported to state otherwise, it was entitled to no weight.

Indeed, the grounds for rejecting such testimony in this case are even stronger than in Gypsum. In this case the permitted contradictions were by deposition, not live testimony, and were not merely of documents, but also of laws of the nation, to which our own courts are bound under the act of state and comity doctrines to give full force and effect.

Furthermore, post-hoc statements by legislators have no probative value. In Weinberger v. Rossi, 456 U.S. 25 (1982), this Court stated:

> [A]s time passes memories fade and a person's perception of his earlier intention may change. Thus, even when it would be otherwise useful, subsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment. Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 118 and n.13 (1980). (456 U.S. at 35).

The documentary record in this case should have precluded the lower courts from giving any weight to parol evidence created twelve years after the fact as a litigation afterthought. Oral testimony unsupported by documents or concrete evidence is simply not enough to even create a genuine issue of fact as to contrary documents, much less overcome a

clear, consistent, unambiguous, contemporaneous documentary record. Argus, Inc. v. Eastman Kodak Co., 801 F.2d 38, 45 (2d Cir. 1986), cert. denied, ___ U.S. ___, 107 S. Ct. 1295 (1987).

In sum, both lower courts in this case placed exclusive reliance on oral testimony they should have ignored, and they ignored unambiguous contemporaneous legislation which, under the Act of State Doctrine, was controlling.

IV. THE DECISION BELOW SELECTIVELY INVOKED GOVERNMENT ACTS AGAINST PLAINTIFF BUT UNFAIRLY AND IMPROPERLY IGNORED THE GOVERNMENT ACTS WHICH PROVE PLAINTIFF'S CASE

A. Resolution 11927

Among the points Plaintiff took up to the Court of Appeals was the District Court's grant of partial summary judgment dismissing its claim for continued full royalty payments under the 1965

private contract. The District Court had ruled that Resolution 11927, an act of the Ministry of Natural Resources in 1974, and its affirming "Sentencia" expressly authorized the reductions of royalty payments by abrogating the volume base provisions of the parties' 1965 contract to that extent (A241-A243, A265-A266).

The Court of Appeals affirmed that partial summary judgment, as it did the denial of Plaintiff's subsequent motion to set it aside, expressly approving the District Court's view that "the Ecuadorian government had addressed directly" this volume base issue (A18-A20).

That issue involved solely the interpretation of an Ecuadorian government resolution. Because the lower courts applied an act of state analysis in that instance, Plaintiff does not

seek further review of that issue here. However, the respect both lower courts accorded to Resolution 11927 contrasts sharply with their unwillingness to do the same with Decrees 666, 1030, 1438 and the related Ecuadorian government acts listed above which "addressed directly" what CEPE's payments were for.

B. The Non-Existent "Sovereign Fiat"

Another implicit act of state analysis used against Plaintiff is found in the Court of Appeals' conclusions regarding Plaintiff's unjust enrichment claims, where it stated (A15):

> Phoenix errs when it looks to the 1961 Minas Concession Agreement to determine the extent of petroleum rights Ecuador had conveyed. Even if under that Agreement the concessionaires had certain exploitation "rights," the Ecuadorian government later transformed those "rights" into a fully revokable "license" or "permit" which involved no title to the land or minerals

> whatsoever. By an exercise of sovereign fiat, the government -- whether because of the large oil discoveries in 1971 or the accession to power of a military government in 1972 -- simply changed the legal dimensions of the interests under the 1961 Concession. All parties, Phoenix as well as the oil companies, lost as a consequence of this transformation.

The "sovereign fiat" to which the Court was referring was the 1971 Hydrocarbons Law, made retroactive by decree in 1972. The Court's earlier reference to that event was as follows (A5):

> In 1971, Ecuador enacted the new Hydrocarbons Law which declared that "[t]he deposits of hydrocarbons and accompanying substances ... located in the national territory ... belong to the inalienable and imprescriptible patrimony of the State." Although originally enacted to be prospective in effect, the new law was made retroactive when a military government took power in 1972.

The Court of Appeals also placed great reliance on the deposition testimony of

the former officials who "restated the Ecuadorian government's consistent position that the petroleum reserves belonged to the State" (A14).

But the importance the Court of Appeals gave to the declaration of state ownership of the reserves was wrong as a legal matter. It attributed to the 1971 Hydrocarbons Law an effect it did not have, as the principle of state ownership of the reserves was prior law (A354-A356) that was merely carried forward in 1971. The 1972 retroactivity decree thus had no effect on the ownership of the reserves which had always been in the State. The concession rights had never involved title to the land or minerals. Given that, the "change" in the "legal dimension" of the 1961 concession rights, upon which the Court of Appeals based its conclusion

that the government had "transformed" the consortium's rights into a "'fully revokable license' or 'permit' which involved no title to the land or minerals whatsoever" simply never occurred.

Furthermore, the 1971 Hydrocarbons Law specified contractual forms only. It nowhere used the term "license." Indeed the 1971 law did away with license-type concession that had been allowed under prior law and now required that all concessions be converted to contractual form, not vice versa as the Court of Appeals decided in this case.[10]

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[10]The 1937 Petroleum Law allowed for the simple government "grant" of concessions "by denouncement" (A359-A360), for which an annual "license fee" was required (A361). Contractual concessions, by comparison, paid "surface" fees (A360), not "license" fees, and were not merely "granted," but required a signed contract (A357-A359). It is not disputed that the 1961 Concession was a contractual concession.

The Court of Appeals' conclusion that the 1961 concession contract had been converted by the 1971 law into a mere "license" was thus plain legal error.

But even if it were not, the Court failed to explain how it could invoke Ecuador's supposed "sovereign fiat" against Plaintiff, but not extend the same respect to Ecuador's sovereign laws and resolutions between 1974 and 1977 declaring that compensation for Defendants' contract rights, whatever their "legal dimensions" may, in the Court's view, have become, was by law included within the aggregate $160 million in lump sum considerations that were concededly paid to them.

That Defendants had sought more money is undeniable. But the government's unwillingness to pay more did not

change the laws providing that the lump sum payments were full compensation for the contract rights and other assets purchased.

C. The Government's Other Actions Toward The Consortium

The Court of Appeals also placed heavy reliance on other government regulatory actions between 1974 and 1977 (A5-A8) as evidence that "Ecuador had no intention of compensating the consortium for their lost production rights" (A14).

It is not the function of this Petition to catalog the many ways in which the Court's summary exaggerates the evidence. What is important is that the Court in effect again implicitly applied an act of state analysis against Plaintiff by relying on this "series of government actions" which "reduced the profitability of the venture" (A4) as

evidence that the government did not intend to pay for "lost production rights" (A14).

The point is that however arbitrary the Court of Appeals may have perceived the other government actions to be, that has no bearing on the plain meaning of, and certainly does not justify ignoring, the government decrees by which it purchased participations in the consortium's rights and assets. Apart from the de facto reversal of the decrees and resolutions declaring that CEPE's payments were compensation for undivided participations in rights and assets, no other government resolution, law, decree or action contained in the 9000-page record in this 12-year old case was declared by either lower court to have meant the opposite of what it said. Under a proper and fair application of

the Act of State Doctrine, the government acts declaring what the payments were for should have been given equal respect.

V. THE DECISION BELOW IMPROPERLY INJECTS THE JUDICIARY INTO SENSITIVE FOREIGN DIPLOMACY ISSUES WITHIN THE EXCLUSIVE PROVINCE OF THE EXECUTIVE BRANCH

There is hardly an area more fraught with issues of state sovereignty, so devoid of international consensus and, therefore, so delicate an area of international diplomacy as the exploitation of natural resources in one country by the entrepreneurs of another. See Int'l Ass'n of Machinists and Aerospace Workers v. OPEC, supra.

By deciding that Ecuador, when it stated it was purchasing and paying for rights, was not doing that at all but was in fact taking those rights without

compensation, the Court of Appeals injected itself into these sensitive areas of foreign policy. But the teaching of this Court under the Act of State Doctrine holds that to level a charge of confiscation against a foreign sovereign is clearly a decision for the executive branch. If this was true in the Cuban sugar cases, it is all the more true here, where Ecuador, a friendly nation, affirmatively declared it was paying for everything it acquired, including rights. And it is especially true here because the U.S. executive branch in fact intervened on Gulf's behalf in 1976 (A461-A473) to avoid what would have been outright confiscation (A104-A105).[11]

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[11]This threat was provoked by Gulf's illegal withholding of deposits required to be made to the Central Bank of Ecuador (A103, A461-A464), not by its protests of the quantities of oil lifted

(continued...)

In Sabbatino, this Court stated:

> If the Executive Branch has undertaken negotiations with an expropriating country, but has refrained from claims of violation of the law of nations, a determination to that effect by a court might be regarded as a serious insult...(376 U.S. at 432).

In this case the U.S. State Department intervened, used its good offices to bring about the 1977 Gulf sale, placed its imprimatur on the arrangements eventually negotiated and did not accuse Ecuador of having confiscated rights. Nor, of course, did Gulf.

With this background, the judgment of the Court of Appeals that Ecuador nevertheless did in effect confiscate rights contravenes not only Ecuador's laws, but the considered posture of those responsible for making U.S. for-

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[11](...continued)
by CEPE as the Court of Appeals said (A8).

eign policy. This is precisely the type of potentially serious insult this Court feared in Sabbatino unless the Act of State Doctrine is interposed to prevent it.

VI. THE PAYMENT DECREES SHOULD HAVE ALSO BEEN GIVEN EFFECT UNDER THE PRINCIPLES OF COMITY

In Hilton v. Guyot, 159 U.S. 113 (1895), this Court defined comity as follows:

> "Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws. (159 U.S. at 163-64).

In the case of an act of state, particularly where no clear violation of international law is shown, the "principles of comity underlying the act of state doctrine warrants recognition and enforcement of the foreign act." Sabbatino, supra, 376 U.S. at 458 (dissenting opinion).

Thus, apart from their obligations under the Act of State Doctrine, the courts below were required by considerations of comity to accord to the payment decrees the natural effect which flows from their plain language. That language leads to the only permissible conclusion under Ecuadorian law -- that the compensation paid by CEPE, regardless of amount or calculation method, was for undivided interests in rights and assets.

Whether a comity or act of state analysis is used, therefore, Plaintiff satisfied its burden, assigned in Phoenix III (pp. 27-28, supra), of proving that Defendants were compensated for future oil production rights and consequently were liable for unjust enrichment. The only remaining task of the Court of Appeals should have been to address the unrebutted evidence establishing the equitable shares of the purchase prices Plaintiff is entitled to recover.

CONCLUSION

In an age of transnational commerce, foreign law questions will find

their way into the courthouse with increasing frequency. Many will, like this case, involve a sovereign's pronouncements related to the issue to be decided. Litigants should be able to expect that the Act of State Doctrine and the principles of comity will be uniformly applied in the adjudicatory process unless valid reasons are stated for not doing so. Petitioner submits that the record in this case makes it a particularly appropriate vehicle for the Court to lay down guidelines governing the deference required to be given to foreign laws and other official actions so that more consistent adjudication of these important questions can be achieved in the future.

The Petition for Certiorari should be granted and the case scheduled for argument.

Dated: New York, New York
July 25, 1988

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APPENDIX

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 87-3375 and 87-3389

PHOENIX CANADA OIL COMPANY LIMITED,
Appellant in No. 87-3389

v.

TEXACO, INC., TEXACO PETROLEUM COMPANY,
ECUADORIAN GULF OIL COMPANY,
AND GULF OIL CORPORATION,
NOW, BY CHANGE OF NAME,
CHEVRON, U.S.A., INC.
Texaco Petroleum Company and
Ecuadorian Gulf Oil Company,
Appellants in No. 87-3375

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF DELAWARE
(D.C. Civil No. 76-421)

Argued December 3, 1987

Before: WEIS, HIGGINBOTHAM,
and ROSENN, *Circuit Judges*

Filed March 30, 1988

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OPINION OF THE COURT

WEIS, *Circuit Judge*.

As the beneficiary of a royalty arrangement, plaintiff Phoenix seeks compensation for its proportionate share of oil production rights in Ecuador which defendant oil companies allegedly conveyed to that government. The district court found that Ecuador had paid defendants only for unamortized capital assets and supplies but nothing for production rights. Consequently, plaintiff did not succeed on that claim. The district court, however, did award plaintiff damages for past-due royalties which had been earned but calculated improperly, finding only defendant subsidiaries liable, not their parent corporations. We will remand for further factual development of a possible agency relationship between parent and subsidiary corporations, but otherwise will affirm.

After a nonjury trial, the district court entered judgment against plaintiff Phoenix Canada Oil Company, Ltd. on its claim for recovery of the value of petroleum production rights, and in favor of Phoenix on its claim for payment of past-due production royalties. The automatic stay provision of the Bankruptcy Code, 11 U.S.C. § 362, precluded entry of a final judgment as to defendant Texaco, Inc. However, the district court entered judgment with respect to the other three defendants, certifying there was no cause for delay.

Phoenix's predecessors obtained a concession from the Government of Ecuador to explore for oil in the eastern lowlands of that South American country. Subsequently, Phoenix and a Canadian co-venturer succeeded to these exploration rights, and they, in turn, assigned a portion of their concession territory to

Gulf and Texaco in exchange for an immediate cash payment and a royalty on any oil extracted. Although Gulf and Texaco successfully produced oil in the assigned territory, a series of government actions reduced the profitability of the venture, and Gulf eventually sold its interest back to the Ecuadorian government. As a result of this sale, Phoenix's royalty base was reduced significantly. Phoenix brought this suit to recover damages for its lost royalty interests.

I.

In 1961, the Ecuadorian government granted Minas y Petroleos del Ecuador a concession to explore for oil and, if discovered, exploit the reserves found in an eleven million acre tract. In 1965, Minas entered into a contract with a consortium of Gulf and Texaco subsidiaries. Under the provisions of the agreement, the subsidiaries succeeded to Minas' exploitation rights in a portion of the original concession, a large area of land identified in the contract as the "Coca Concession".[1] In return, the subsidiaries made a cash payment to Minas' two corporate owners, Phoenix and Norsul,[2] agreeing to pay a royalty calculated at two-percent of the net value of any crude oil or natural gas produced from the area. The government formally approved the transfer, but was not informed of the two-percent royalty arrangement.

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1. Minas apparently failed to meet the government's investment requirements for the remaining portion of its 1961 Concession area. In February 1973, the Ecuadorian government declared the non-transferred portion of the Minas Concession forfeited to the State.

2. Shortly after the Ecuadorian government granted the Minas Concession, Norsul Oil and Mining Ltd., a small Canadian corporation, acquired Minas y Petroleos del Ecuador. Two years later, at Norsul's invitation, Phoenix joined in the Ecuador operation as a co-venturer. Norsul is not a party to this appeal.

Oil was discovered in the Coca Concession in 1969, and actual production began in 1972. To transport the crude to market, the Gulf-Texaco consortium financed and constructed a 318-mile pipeline across the Andes Mountains down to the Pacific Coast. The pipeline cost the consortium $108 million.

Following the 1969 announcement that oil had been discovered, the government required renegotiation of all concession arrangements. The Coca Concession consequently was reduced in area, and the government royalties were nearly doubled from 6% to 11.5%.

In 1971, Ecuador enacted the new Hydrocarbons Law which declared that "[t]he deposits of hydrocarbons and accompanying substances . . . located in the national territory . . . belong to the inalienable and imprescriptible patrimony of the State." Although originally enacted to be prospective in effect, the new law was made retroactive when a military government took power in 1972.

The 1971 Hydrocarbons Law further reduced the size of concessions and again raised the government's royalty. In addition, the statute provided that the government's royalty and income taxes would henceforth be computed for all producers on the basis of a uniform "reference price", which could be set either by agreement with the producers or unilaterally by the government. The law also mandated governmental participation in oil production through "association contracts" to which the national oil agency, Corporacion Estatal Petrolera Ecuatoriana (CEPE), would be made a party.

The consortium requested indemnification from the government for the area that had been returned in compliance with the Hydrocarbons Law. The government refused, explaining that the payment of

compensation for the return of "the inalienable interests of the Nation" was inconsistent with the petroleum policy of the "Nationalistic and Revolutionary Government of the Armed Forces."

Citing the increasing costs of doing business under the new military government, the consortium insisted that the original provisions of the 1965 contract had been frustrated and demanded renegotiation of two-percent royalty proviso with Phoenix. In early 1973, the parties reached an "Interim Agreement" to govern the calculation of the royalty payments due for the last two quarters of 1972 and the first quarter of 1973. This document, however, stipulated that the signatories were not waiving their rights under the original 1965 contract.

Although the Interim Agreement expired after the first quarter of 1973, its terms were followed through the third quarter of 1973. A dispute between the parties arose when the consortium continued to calculate the two-percent royalty under the Interim Agreement for the final quarter of 1973 and the first and second quarters of 1974. The district court's ruling on that point is one of the issues in this appeal.

The Interim Agreement renegotiation drew the government's attention to the previously unknown two-percent royalty arrangement. The Ecuadorian Natural Resources Minister reacted with hostility to the news of the discovery, declaring it an "illegal" and "immoral" attempt to partition a national resource belonging inalienably to the people of Ecuador. Rather than voiding the royalty outright, as the Resources Minister urged, the government instead imposed an 86% retroactive tax on the payment of the two-percent royalties.

In 1973 the government issued a decree establishing the terms of a new model contract, which

the consortium and other oil producers were bound to accept in lieu of existing agreements. The model contract granted CEPE the right to acquire up to a 25% participation in the "rights and actions conferred in this contract and in the assets acquired by the contractors for purposes of this agreement." Also included were a tax reference price unilaterally set by the government, a provision shortening the Coca Concession exploitation period, and an expansion of state-imposed discounts for oil purchased for domestic use in Ecuador.

Consortium efforts to negotiate a mutually advantageous purchase price for the 25% interest proved unavailing. Instead, the government stated flatly that CEPE would begin its 25% participation on June 6, 1974 and that compensation would be computed on the basis of net book value, or the unrecovered actual investment in producing and pipeline assets. An independent auditor was engaged to establish the exact value of the unrecovered investment. The government rejected the consortium's request to be paid for future production rights lost as a consequence of the transfer.

The following year, a resolution announced that CEPE would not pay for its proportionate share of the cost of the pipeline. In conducting its 1976 audit, Peat, Marwick, Mitchell & Company excluded the pipeline expenditures and calculated the net book value of the consortium's investment at $182 million. Over a nearly five-year period, Ecuador paid the consortium one-fourth this sum, or a total of $45,033,671. No interest was paid for the delay.

While the CEPE acquisition proceeded, other significant events were taking place as well. In June 1974, the government issued Resolution 11927 to clarify the two-percent royalty due Phoenix and Norsul

from the consortium. The expressed purposes of this resolution were to "terminate the disagreements arising out of the assessment and payment of two-percent of the net production" and to "establish with certainty the taxable base which generates the [86%] income tax."

The Resolution imposed an additional requirement that Phoenix and Norsul invest at least half of their remaining 14% after-tax royalty payments in Ecuador. The Resolution also provided that CEPE's newly acquired 25% interest "be excluded, in order to carry out the assessment of the 2%." When challenged by Texaco, the Resolution was affirmed by a Ministerial Sentencia in October 1974.

In the years that followed, the government of Ecuador took other drastic steps which further diminished the profitability of the consortium's Coca Concession venture. One new requirement directed that the consortium deposit all export proceeds with the Ecuadorian Central Bank in order to ensure the government its petroleum royalties.

Income tax rates rose to 71.5% in 1975. Ecuador nearly tripled its government oil royalty to 17%, announcing that the royalty would be computed on the basis of "presumed", rather than actual, petroleum production. The figure the government assigned to this "presumed" production not only exceeded actual output, but was greater than the maximum volume of oil the consortium was legally permitted to produce. Finally, CEPE began extracting and selling more than its 25% share of crude, without the authorization of, or compensation to, the consortium. When Gulf protested these practices, the state threatened forfeiture.

When its relationship with the government continued to deteriorate, Gulf decided to withdraw from the consortium by selling its remaining 37.5%

interest[3] to CEPE. The sale price was to be calculated on the basis of the unrecovered actual cost of Gulf's investment in producing assets, its materials and supplies inventory, and its undepreciated and unamortized interest in the pipeline. The accounting firm of Deloitte, Haskins and Sells performed the audit on Gulf's assets, listing its total share as $118 million.

CEPE made two payments to Gulf: one in May 1977 and a second in April 1979. No part of these payments was forwarded to Phoenix or Norsul. Following CEPE's acquisition of Gulf's Coca Concession interest, Gulf ceased paying royalties to Phoenix and Norsul. Texaco, however, continued its petroleum production activities on the Coca Concession and continues to pay its 37.5% share of the royalties.

Phoenix brought this suit in 1976, contending that the consortium's 25% sale to CEPE included payment for lost production rights. Phoenix claimed a share of the sale's proceeds corresponding to its lost royalty expectation. It made similar claims as to Gulf's 37.5% sale to CEPE in 1976.

Phoenix asserted its claims under theories of unjust enrichment, breach of contract, and breach of fiduciary duty. Finding that the law of Ecuador controlled, the district court allowed the case to proceed on a theory of Ecuadorian civil law known as

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3. At the time of its withdrawal from Ecuador, Gulf's share in the original Minas Concession had been reduced to 37.5%. Under the terms of the 1965 contract with Phoenix and Norsul, Gulf and Texaco had each acquired a 50% interest in the Coca Concession. In 1974, CEPE's 25% participation had reduced the consortium's share to 75% and, thus, each consortium member's share had been reduced to 37.5%. Following Gulf's withdrawal, CEPE retained a 62.5% interest in the Coca Concession and Texaco retained a 37.5% interest.

"de in rem verso," analogous to an action for unjust enrichment. This restitution theory, the court ruled, subsumed Phoenix's quasi-contract claim. The court rejected Phoenix's claim for breach of fiduciary duty as untimely pressed.

After years of discovery and extensive pretrial proceedings that included a grant of partial summary judgment, the case reached trial in September 1986. Following a month-long bench trial, the district court prepared a thorough opinion reciting its extensive findings of fact and conclusions of law. *Phoenix Canada Oil Co. Ltd. v. Texaco, Inc.*, 658 F. Supp. 1061 (D. Del. 1987) (*Phoenix IV*).

The district court ruled that Phoenix could not succeed on its unjust enrichment claim because neither the consortium in its joint 25% transfer in 1974 nor Gulf in its 37.5% sellout in 1977 had received any compensation for lost production rights or future profits. The government of Ecuador had expressly intended to pay only for the depreciated and amortized book value of the acquired assets, plus the book value of their material and supplies inventory. "It was contrary to the political philosophy of the Government of Ecuador in 1974 and in 1977 to pay for the oil reserves, which were the property of the State, the rights to exploit those reserves, or the future profits that might be earned from those reserves." *Phoenix IV*, 658 F. Supp. at 1078. Because Phoenix was not entitled to share in the value of the consortium's assets, the claims for unjust enrichment failed.

The court found in favor of Phoenix on its breach of contract claim that the consortium had improperly calculated the royalties due for the final quarter of 1973 and the first two quarters of 1974. The consortium had computed the two-percent royalty during those quarters on the basis of the price of West Texas sour crude oil as adjusted for transportation

costs. This calculation proved especially advantageous for the consortium because, although the world price of oil rose dramatically during this period, federally-imposed controls capped the cost of West Texas crude at a rate far below world market levels.

The court concluded that the consortium's application of the West Texas price breached the parties' 1965 contract. Because the higher Ecuadorian government reference price was the proper basis for calculating the two-percent royalty, Phoenix had been underpaid by $365,479. To that sum, the court added prejudgment interest of $532,608.71 -- computed in accordance with the escalating Ecuadorian rates -- for a total judgment of $898,087.71. Phoenix's claim for consequential damages, consisting mainly of attorney's fees, was denied because it had not been included in the pretrial order. This appeal followed.

Phoenix contends here that the district court erred in equating the amounts CEPE paid to the consortium with the interests actually transferred. In Phoenix's view, the consideration defendants received included reimbursement for future petroleum production rights. Because Phoenix's royalty arrangement entitled it to a share of the future Coca Concession production proceeds, it claims a right to a portion of CEPE's payments. Phoenix also challenges the district court's decision to foreclose its quasi-contract and breach of fiduciary duty causes of action.

Additionally, Phoenix asserts that the district court erroneously computed the underpaid 1973-74 royalties by excluding CEPE's 25% interest from the royalty volume base. Phoenix argues that its overdue royalty should be computed on the basis of the entire Coca Concession, with CEPE's 25% share included. Finally, Phoenix appeals the district court's refusal to consider its claim for consequential damages.

Phoenix insists, as well, that in exonerating Gulf Oil Company and Texaco, Inc., the district court erred because it failed to consider that the parent corporations of the Ecuadorian subsidiaries were actively involved in negotiating the breached 1965 contract and subsequent transactions. Phoenix seeks to hold the parents liable for their subsidiaries' actions.

Defendants cross-appeal. They maintain that the district court incorrectly read Ecuador's Resolutions as assigning the government's tax reference price -- rather than the federally-capped West Texas crude price -- to the two-percent royalty calculation. As a consequence, they argue that the court improperly ruled in Phoenix's favor on the breach of contract claim. Defendants also assert that the district court erred in its interpretation of Ecuadorian law on prejudgment interest.

II. *PHOENIX'S APPEAL*

A. *Unjust Enrichment Claim*

In 1983 and 1984 pretrial rulings, the district court determined that the law of Ecuador would govern Phoenix's unjust enrichment claim and that, under Ecuadorian law, the claim would proceed as an action *de in rem verso*. The parties have not challenged either determination. An action *de in rem verso* consists of five elements: (1) enrichment of the defendants; (2) loss to the plaintiff; (3) lack of justification for the enrichment; (4) no other legally available remedy; and (5) absence of a law barring the action. *Phoenix Canada Oil Co. Ltd. v. Texaco, Inc.*, No. 76-421, slip op. at 10-11 (D. Del. July 20, 1984) (unpublished) (*Phoenix III*) (quoting 4 Alesandri & Somarriva, Curso de Derecho Civil ¶ 1233 (1942), as translated by R. Medina, Chief, Hispanic Law Div., Law Library, Library of Congress).

To succeed on this cause of action, a plaintiff must prove that the defendant's enrichment is unjust or illegitimate and results in a real and effective increase in the defendant's net worth. A mere avoidance of expenditures that simply prevents a decrease in net worth is insufficient proof. Moreover, the defendant's increase must correspond to the plaintiff's becoming poorer: a causal relationship must exist between the defendant's enrichment and the plaintiff's loss. *Id.*

Phoenix did not advance funds for the purchase of any equipment used in the oil production; nor did it invest in inventory or other necessary materials or supplies. Phoenix's interest, therefore, was confined simply to a two-percent share of actual petroleum production. Unquestionably, Phoenix lost some of its future royalty interests when the consortium transferred a portion of their Coca Concession exploitation rights to CEPE. That fact, however, does not establish the defendants' enrichment at Phoenix's expense.

Phoenix does not dispute that the value the independent auditors assigned for the 1974 and 1977 transfers included no specific allowance for future production rights, nor was any value assigned to them. Phoenix argues that both conveyances used the word "rights" to describe the subject of the contracts and, therefore, more than mere physical assets were intended to be transferred. Phoenix maintains that CEPE purchased both physical assets and future production rights in 1974 and 1977, using the net book value figure merely as the measure of the purchase price. The district court carefully considered this argument, but rejected it as unpersuasive.

The fact that CEPE's acquisition prices corresponded exactly to the investments' book values militated against Phoenix's assertion. In addition,

testimony given by the former Ecuadorian Natural Resources Minister and his legal advisor belie Phoenix's conclusion. These officials restated the Ecuadorian government's consistent position that the petroleum reserves belonged to the State. In their view, Ecuador "did not have to pay for something that was its own property." *Phoenix IV*, 658 F. Supp. at 1071. "It was an act of full sovereignty so that it did not pay one single cent and it had no reason to do so." *Id.* This testimony, considered along with the course of the government's dealings with the Texaco-Gulf consortium in the early 1970s and the State decree declaring all petroleum reserves the patrimony of the nation, is compelling evidence that Ecuador had no intention of compensating the consortium for their lost production rights.

Phoenix points to large profits the consortium realized over the years from its Coca Concession venture as a justification for an equitable redistribution of the proceeds from the 1974 and 1977 sales. This argument blurs the proper legal focus. The defendants' net gains are irrelevant in an unjust enrichment analysis. "Profits, no matter how large, do not constitute unjust enrichment unless they equitably belong to another person." *Harris v. Sentry Title Co.*, 715 F.2d 941, 950 (5th Cir. 1983), *cert. denied*, 469 U.S. 1037 (1984). The terms of its 1965 contract entitle Phoenix to a two-percent royalty of net petroleum production -- not a share in the profits.

Finally, Phoenix cites paragraph 2.13 of the 1977 conveyance, which provided: "With respect to the obligations that Gulf may have in favor of third parties and that do not appear in its accounting records, neither the Ecuadorian State nor CEPE assume any responsibility and must be taken care of by Gulf." This provision adds nothing to Phoenix's claim for recovery under *de in rem verso*.

Phoenix errs when it looks to the 1961 Minas Concession Agreement to determine the extent of petroleum rights Ecuador had conveyed. Even if under that Agreement the concessionaires had certain exploitation "rights", the Ecuadorian government later transformed those "rights" into a fully revokable "license" or "permit" which involved no title to the land or minerals whatsoever. By an exercise of sovereign fiat, the government -- whether because of the large oil discoveries in 1971 or the accession to power of a military government in 1972 -- simply changed the legal dimensions of the interests under the 1961 Concession. All parties, Phoenix as well as the oil companies, lost as a consequence of this transformation.

The record contains support for the district court's factual findings, and Phoenix has failed to satisfy us that they were clearly erroneous. To the extent that the conclusions of the district court embody questions of law, we find no reversible error. Consequently, the judgment against Phoenix with respect to unjust enrichment must be affirmed.

B. *Quasi-Contract and Fiduciary Duty Claims*

Phoenix objects to the pretrial dismissal of its quasi-contract and breach of fiduciary duty claims. Neither of these claims had been fully briefed or vigorously pursued below. Phoenix never specified the elements of the claims under Ecuadorian law, nor did it explain how its allegations conformed to those elements. As the party seeking to recover under a foreign nation's cause of action, Phoenix bore the burden of proving its entitlement to that relief. *Cuba R.R. v. Crosby*, 222 U.S. 473, 479 (1921).

For ten years, the district court wrestled with this case, battling a seemingly never-ending barrage of paper. In *Phoenix II*, the court characterized the

pretrial condition of the case as a "hopelessly confused morass." *Phoenix Canada Oil Co. Ltd. v. Texaco, Inc.*, 560 F. Supp. 1372, 1390 (D. Del. 1983) (*Phoenix II*). By that time, seven years after the suit was filed, the court justifiably could expect Phoenix to have clarified its position and finally have settled on its legal theory. The court struggled toward narrowing the issues for trial and deserved the litigants' cooperation.

In the 1983 pretrial "wrap-up" the court ruled that the three-year statute of limitations barred recovery for all tortious acts occurring before November 26, 1973. At that stage in the litigation, Phoenix was alleging that the defendants had tortiously engaged in a continuing scheme to destroy it. However, most of the alleged activity occurred outside the statute of limitations, and was thus time-barred. As to the remaining allegations, the court determined that the facts charged as tortious sounded in contract rather than tort.

At a pretrial conference following the 1983 ruling, the parties presented the court with a 184-page proposed pretrial order, which the court declined to accept. The parties subsequently filed additional briefing on Ecuadorian law and further argument followed. Most efforts during this period were devoted to exploring Ecuadorian law on unjust enrichment. As the court noted, only two issues not previously decided were raised: "the parameters of an unjust enrichment theory in Ecuador and that relating to a contract dispute over the three quarters of royalty payments." *Phoenix III*, slip op. at 5.

In deciding how to proceed on Phoenix's unjust enrichment claim, the court reviewed the three principal quasi-contract theories enumerated in the Ecuadorian Civil Code: the "unsolicited agency, the payment of something not owed, and the community." *Phoenix III*, slip op. at 9 (citing Civil Code art. 2212

(Ecuador)). The court stated that ambiguities in those provisions of the Code "might well lead to a statutory basis behind plaintiff's claim." Nevertheless, the court concluded that Phoenix's inability to fit its allegations squarely into one of these three civil code sections would not preclude a recovery under a "general theory of unjust enrichment." *Id.*

After further study, the court announced that Phoenix could proceed to trial on the unjust enrichment *de in rem verso* theory. The court observed also that Phoenix might have "a few lingering contract claims of minor pecuniary significance relating to the three quarters of 1973 and 1974. If plaintiff so desires, those claims, too, will proceed to trial." The court then directed the parties to submit a "manageable" proposed pretrial order. *Phoenix III*, slip op. at 18.

Phoenix later attempted to resurrect its defunct tort cause of action, this time as a claim for breach of fiduciary duty. The court permitted this count -- added seven years after the original complaint was filed -- to be briefed, and argued during the final pretrial conference on February 18, 1986. After consideration, the district judge directed that the trial proceed only as to the two theories outlined in the 1983 order: unjust enrichment and breach of contract. As to the belated breach of fiduciary duty claim, the judge stated: "It would appear to me that the plaintiff is saying we acknowledge the validity of the decrees of the Ecuadorian government but the plaintiffs are entitled to go through the back door to attack the defendants for permitting the decrees to have been made."

After our examination of the lengthy history of this case, we think it appropriate to commend the district judges for their tireless efforts to narrow the issues to manageable proportions. Having carefully monitored the pretrial developments for nearly a decade, the district court's preclusion of an issue raised at the

"twenty-third hour", it seems to us, was within the court's proper discretion. In any event, though not determinative, our review leads us to conclude that Phoenix had little likelihood of success on either its quasi-contract or breach of fiduciary duty theory.

In *Phoenix II*, Judge Schwartz observed that the "concept of unjust enrichment -- basically an equitable premise -- structurally forms the basis for theories of quasi contract." *Phoenix II*, 560 F. Supp. at 1384. *See* Kovacic, *A Proposal to Simplify Quantum Meruit Litigation*, 35 Am. U.L. Rev. 547, 554 (1986). Phoenix's own legal expert, Rene Bustamente Munoz, has explained that the same is true under the law of Ecuador: "We also consider that unjust enrichment or enrichment without cause is the foundation of all the quasi contracts mentioned by Arts. 1480, 2211 and 2212 of the Civil Code as one of the sources of obligations." (App. 804) As a result, our determination that the district court correctly rejected Phoenix's unjust enrichment claim similarly dooms its claims under quasi-contract.

There is no reversible error here.

C. *Volume Base Claim*

In its 1983 pretrial ruling, the district court granted summary judgment against Phoenix on its claim that the consortium improperly had excluded CEPE's 25% interest when computing the two-percent royalty payments. Yielding to the model contracts the government had decreed for all oil companies in 1973, the consortium reluctantly transferred 25% of its interest in the Coca Concession to CEPE. Following this transfer, the consortium reduced by CEPE's 25% the volume base on which it calculated Phoenix and Norsul's two-percent royalty. In the district court, Phoenix contended that this reduction constituted a breach of its 1965 contract.

The district court decided that the Ecuadorian government had addressed directly the amount of oil production which legally could be subjected to the two-percent royalty. Resolution 11927 provided that "there shall be excluded, in order to carry out the assessment of the 2%[,] the percentage of CEPE in the net production." The court accorded this decree and its affirming Sentencia presumptive validity which Phoenix failed to overcome. The court rejected Phoenix's argument that the Resolution could not adjudicate private rights and that it was intended only to apply to the calculation of the government's 86% royalty tax.

Two years later, Phoenix sought reconsideration based on additional documents and the depositions of former Ecuadorian ministers. Phoenix argued that Ministry calculation sheets for 1975 revealed that the government had computed the two-percent royalty on the full 100% volume base and only then taxed at the 86% rate 75% of the volume base. After the depositions were taken and following argument by the parties, the district court denied the motion to reconsider. The court found the newly submitted calculation sheets unenlightening and concluded that the particular mathematics the government used did not change the legal basis on which summary judgment had been entered. Nor did the new evidence create any issue of material fact.

We find no reversible error in the district court's initial entry of summary judgment or its subsequent refusal to alter the ruling in light of the new evidence. Resolution 11927's "whereas" clauses stated expressly that the decree was designed "to terminate the disagreements arising out of the assessment and payment of two percent of the net production established in Clause Sixth of the private agreement signed on July 16, 1965," and also to "establish with

certainty the taxable base which generates the income tax."

The taxation-only interpretation Phoenix encourages us to give Resolution 11927 ignores the government's purpose, stated in the document's first whereas clause, to resolve the disagreements between the parties. Certainly, this goal would not be accomplished if the Resolution's provisions did not apply to the untaxed, distributed portion of the royalty -- that part actually in dispute among the parties. Moreover, the Resolution contains numerous provisions that clearly apply to the entire two-percent royalty, rather than to just the taxed portion.

Read as Phoenix would advocate, the Resolution would require royalty payments on the entire 100% volume base yet only 75% of the royalty payments would be subject to the government's 86% royalty tax. The government, in effect, would be foregoing its 86% tax on a quarter of all royalties paid. The obvious hostility with which the government viewed these royalty payments suggests strongly that it would not have enacted such a provision.

The deposition evidence supports the district court's entry of summary judgment on this claim. The Natural Resources Minister testified that neither CEPE nor any third party was obligated to pay the two-percent royalty on oil that belongs to the State. The Minister's legal advisor was even more specific, stating that under Resolution 11927 the consortium had the duty to pay the two-percent royalties only after deducting from the production amounts that portion belonging to CEPE.

D. *Consequential Damages*

At the conclusion of the month-long bench trial, Phoenix submitted its Proposed Findings of Fact and Conclusions of Law. Included in the submission was a

request for consequential damages (attorney's fees), though such a claim did not appear in the pretrial order. The district court rejected this damage claim as belatedly raised. "This claim was not included in the Pre-Trial Order and we will not permit it to be raised now in this untimely manner." *Phoenix IV*, 658 F. Supp. at 1082.

The pretrial procedures adopted for the federal courts were formulated with the express goal of facilitating scheduling and case management. Fed. R. Civ. P. 16(a) advisory committee's note. Particularly important in complex civil cases such as this, pretrial procedures provide the district courts with a useful tool to harness unwieldy litigation by simplifying the dispute and narrowing the issues for trial. For this reason, pretrial orders bind the parties unless modified by the court to prevent manifest injustice. Fed. R. Civ. P. 16(e). After a decade managing this enormous dispute, the district court acted within its discretion to reject a claim for consequential damages asserted after trial but not in the pretrial order. *See Trujillo v. Uniroyal Corp.*, 608 F.2d 815, 817 (10th Cir. 1979); *Moore v. Sylvania Elec. Prods., Inc.*, 454 F.2d 81, 84 (3d Cir. 1972).

E. *Parental Liability*

The district court entered judgment in favor of Phoenix on its breach of contract claim for undercalculated royalties for the final quarter of 1973 and the first two quarters of 1974. Phoenix also had sought to extend that liability to the parent corporations, Texaco, Inc. and Gulf Oil Corporation. The district court denied this request.

Proceeding only on the basis of an agency theory of parental liability, the district court ruled that the parent corporations would not be liable for the actions of their subsidiaries. The court found that the parents

and the subsidiaries here shared several common officers and directors, though their boards otherwise were separate. The parents also participated in the substantial financial dealings of the subsidiaries, who were required to secure approval from their parent corporations for large investments and acquisitions or disposals of major assets.

On the other hand, the subsidiaries kept separate books and records, maintained their own bank accounts, paid their own taxes, and were responsible for their own day-to-day operations in Ecuador, including drilling oil wells and constructing the pipeline. Relying on *Japan Petroleum Co. (Nigeria) Ltd. v. Ashland Oil, Inc.*, 456 F. Supp. 831 (D. Del. 1978), the district court concluded that "it can hardly be said that the facts presented to the court in this case show complete domination or control by Texaco and Gulf over their subsidiaries." *Phoenix IV*, 658 F. Supp. at 1085.

The relationship between parent and subsidiary corporations has been a fruitful source of litigation and although the case law on the subject is extensive, it is neither uniform nor clear. Some decisions apply an agency theory to assess parental liability, others focus on an alter ego basis, and some speak in terms of "piercing the corporate veil." Much of the confusion stems from a failure to distinguish between subsidiaries treated as independent entities and those in fact not independent, but considered part of the parent corporations.

Courts most often "pierce the corporate veil" where fraud would result if the corporate structure were allowed to shield shareholders from liability. Thus, in *DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co.*, 540 F.2d 681, 685-87 (4th Cir. 1976), the court noted that independent corporate status may be disregarded when such factors as gross

undercapitalization, fraud, failure to observe corporate formalities, non-functioning of officers and directors, or similar circumstances indicate that the subsidiary is merely the shadow of the parent. If, as in this case, the shareholder happens to be another corporation, piercing the corporate veil results in disregard for the separate existence of parent and subsidiary.

In determining whether two corporations are truly separate, significant factors to consider include adequacy of capitalization, overlapping directorates and officers, separate record keeping, payment of taxes and filing of consolidated returns, maintenance of separate bank accounts, level of parental financing and control over the subsidiary, and subsidiary authority over day-to-day operations. *See* 1 Fletcher, *Cyclopedia of the Law of Private Corporations* § 43, at 194 (cum. supp. 1987). In that context, the concept of complete domination by the parent is decisive. *See Craig v. Lake Asbestos of Quebec, Ltd.*, No. 87-1254, slip op. (3d Cir. Mar. 31, 1988). The activities bearing on the issue of corporate independence need not have any particular relationship to the cause of action being asserted.

There is a second theory under which a parent may be held liable for the activities of its subsidiary: an application of general agency principles. One corporation whose shares are owned by a second corporation does not, by that fact alone, become the agent of the second company. However, one corporation -- completely independent of a second corporation -- may assume the role of the second corporation's agent in the course of one or more specific transactions. This restricted agency relationship may develop whether the two separate corporations are parent and subsidiary or are completely unrelated outside the limited agency setting. *See* Restatement (Second) of Agency § 14M, comment (a) (1958). Under this second theory, total

domination or general alter ego criteria need not be proven.

When one corporation acts as the agent of a disclosed principal corporation, the latter corporation may be liable on contracts made by the agent. *See* Restatement (Second) of Agency § 144 (1958). Liability may attach to the principal corporation even though it is not a party named in the agreement. *See* Restatement (Second) of Agency §§ 147, 149 (1958).[4] *See also* W. Seavey, *Handbook of the Law of Agency* § 70 (1964); W.E. Sell, *Agency* § 103 (1975).

Unlike the alter ego/piercing the corporate veil theory, when customary agency is alleged the proponent must demonstrate a relationship between the corporations and the cause of action. Not only must an arrangement exist between the two corporations so that one acts on behalf of the other and within usual agency principles, but the arrangement must be relevant to the plaintiff's claim of wrongdoing.[5]

In reaching its decision to exonerate the parents, the district court relied heavily on *Japan Petroleum*. In that case, despite extensive interaction between parent

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4. Although the agency question could perhaps have been determined under the law of Ecuador, the parties acquiesced in the district court's application of Delaware Law. Phoenix Canada Oil Co. Ltd. v. Texaco, Inc., 658 F. Supp. 1061, 1084 n.43 (D. Del. 1987) (*Phoenix IV*). We see no reason why we should disturb the parties' choice of law in these circumstances. Delaware agency law is consistent with the general common law. *See* Japan Petroleum Co. (Nigeria) Ltd. v. Ashland Oil, Inc., 456 F. Supp. 831, 838-41 (D. Del. 1978) (applying Restatement).

5. This limitation was acknowledged in Fisser v. International Bank, 282 F.2d 231, 238 (2d Cir. 1960), where the court quoted with approval one commentator's view: "Restating the instrumentality rule, we may say that in any case, except express agency, . . . three elements must be proved: (1) Control . . . not only of finances, but of policy and business practice in respect to the transaction attacked. . .."

and subsidiary, the court found them to be separate and, thus, held the parent not liable for the acts of its subsidiary. Apparently, the fact that the Nigerian subsidiary had powers granted by the Nigerian government that were unavailable to the parent was the decisive factor in finding the parent not liable. *Cf. Fitz-Patrick v. Commonwealth Oil Co.*, 285 F.2d 726 (5th Cir. 1960) (incorporation of foreign subsidiary to meet governmental requirement did not insulate parent from liability).

The 1978 holding in *Japan Petroleum* was not appealed by this court, and consequently we have not been called upon to examine the correctness of its analysis. Nor do we embark on a review of that case at this time. We are content with noting that the facts here are sufficiently distinguishable so that the same result would not necessarily follow. Nevertheless, because the issue is one of fact, *see* 1 Fletcher, *supra*, at § 43, at 472 (rev. perm. ed. 1983), we cannot say that the district court's finding of no complete domination here is clearly erroneous.

However, the district court did not analyze customary agency principles as another possible source of parental liability. When using that approach, the completeness of the subsidiary's domination by a parent is not material – the focus instead centers on whether the Ecuadorian corporations, though separate and independent from the United States corporations, acted as agents for disclosed principals.

In conducting this review, the focus must be directed to the pertinent cause of action. Thus, only the judgment in favor of Phoenix on the undercalculation of royalties due for the three quarters in 1973 and 1974 is relevant. The evidence of relationship between the parents and subsidiaries as it bears on that breach of contract is the proper subject of our inquiry.

We can appreciate the difficulty which the district court confronted as a result of the parties' failure to carefully identify the affiliations of many of the actors. For example, in numerous instances individuals identified with Texaco or Gulf are not specifically classified as employees of the Ecuadorian subsidiaries, of the United States' parents, or perhaps employed by one and acting on behalf of the other. Similarly, correspondence which could prove important in assessing attribution of activity to parent or subsidiary is not definitive.

With these uncertainties in mind, we observe with some diffidence that several significant events may bear on the creation of, or absence of, an agency relationship between the subsidiaries and the parents in connection with the 1965 contract.

It appears that the parents negotiated and drafted the 1965 agreement, but it was actually executed by Compania Texaco de Petroleos del Ecuador C.A. and Gulf Ecuatorana de Petroleos S.A. In 1969 when oil was discovered, the parents issued a joint press release announcing that they each owned a fifty percent working interest in the discovered reserves, subject to a two-percent royalty. The release said: "Texaco and Gulf obtained the Coca concession by assignment from Minas y Petroleos Del Ecuador . . .."

When the royalty agreement underwent renegotiation in 1972, employees of the parent corporations apparently assumed a controlling role in the process. It was the parents who recommended the use of West Texas crude as the reference price for calculating the two-percent royalties.

CEPE made its 1977 buyout payment for the Gulf interest to the parent, Gulf Oil Corporation, at the parent's home bank in Pittsburgh. Although that event occurred several years after the three quarters breach of contract, it nevertheless may shed some light on the

nature and extent of the control exercised by the parent as principal in earlier years. *See Verreries De L'Hermitage v. Hickory Furniture Co.*, 704 F.2d 140, 142 (4th Cir. 1983).

Because the district court did not explore customary agency principles as a possible source of parental liability, we will remand for further inquiry and fact-finding to determine the applicability of those principles to the case at hand. We note that, under usual agency principles, complete domination by the parents in the general conduct of the subsidiaries' affairs is not a prerequisite. The parents and subsidiaries may fully maintain their separate corporate existences; yet, as any two unrelated companies, they might have entered into a limited agency relationship for a specific transaction. Whether this occurred here is a question of fact reserved to the district court.

III. *TEXACO AND GULF CROSS-APPEAL*

A. *BREACH OF CONTRACT*

At trial, Phoenix was awarded $365,479 for its breach of contract claim for undercalculated royalties. The court ruled that, in computing the two-percent royalty, the consortium had improperly adopted the federally-capped West Texas crude price instead of the higher Ecuadorian government's tax reference price. Defendants cross-appealed from this ruling, contending that their calculations comported with the terms of the 1965 contract.

The two-percent royalty arrangement was set out in paragraph 6 of the 1965 contract. The provision states that, for all purposes of the contract, the value of the crude oil "shall be understood as the value defined in each case for the purpose of calculating the payment of the royalties which cessionaires must make to the Government." Paragraph 8, on which defendants rely,

provides that the price calculations were to be made on the "same bases established for the respective payments to the Government, according to [the 1961 Minas Agreement]."

The 1961 Minas Agreement established a formula for calculating the royalty owed the government based on "the average volume of the oil in the world market." To compute this average value, the Agreement created the equation X = A − B, in which "X" represented the world market value, "A" represented the West Texas crude price, and "B" represented the cost of transporting the crude from Ecuador to New York.

However, the 1971 national Hydrocarbons Law explicitly superceded all existing contractual provisions on the calculation of government royalties. Article 65 of the Hydrocarbons Law stated: "Royalties in cash, income tax, government's participation and generally any assessments depending on the sale price of hydrocarbons in the foreign market, shall be regulated by the reference prices of petroleum." The government unilaterally set this "reference price."

The passage of this new law revealed a previously undetected conflict between paragraphs 6 and 8 of the 1965 contract. Paragraph 6 tied Phoenix's royalty to the value of the government royalty, a figure the 1971 Law had legislatively increased. Paragraph 8 appeared to link the Phoenix royalty to the value of the government royalty as it would have been calculated under the 1961 Minas Agreement – the lower West Texas price.

In resolving this apparent conflict, the district court ruled that the Hydrocarbons Law had supplanted the terms of the 1961 Agreement to which paragraph 8 referred. "Once the 1971 Law was promulgated, calculation of government royalties under the 1961 Concession Contract was based no longer on . . . the 1961 Contract, but on . . . the 1971 Law." *Phoenix IV*,

658 F. Supp. at 1080. Thus, because the two-percent royalty was dependent on the amount "which cessionaires must make to the Government," the Hydrocarbons Law altered not only the calculation of the government royalty, but the calculation of Phoenix's royalty as well.

If the ambiguity of the two-percent royalty provisions of the 1965 contract has led to a result defendants had not anticipated, the fault is their own. As authors of the contract, they could have made their terms plain; their failure to do so cannot inure to their benefit. *See John F. Harkins Co. v. Waldinger Corp.*, 796 F.2d 657, 662 n.2 (3d Cir. 1986), *cert. denied*, 107 S. Ct. 939 (1987). We agree with the district court that the contract's reference to the amount paid in government royalties necessarily established a benchmark which could be altered by the State through force of law.

We have examined in detail the defendants' other contentions and we are not persuaded. We accept the view of the district court.

B. *SEGMENTED PREJUDGMENT INTEREST*

On the $365,479 breach of contract judgment, the district court awarded $532,608.71 in prejudgment interest. Defendants challenge the court's calculation of this sum.

The 1965 contract contained no prescribed rate of interest, and the parties agree that Ecuador's legal rate of interest would be applicable. Defendants contend that awards of prejudgment interest under Ecuadorian law accrue from the date of service of process. The district court accepted this starting date and then sought to apply the appropriate rate, a task complicated by the precipitous rise in interest rates that occurred during the pendency of this litigation.

At the time the complaint was served, the legal rate of interest in Ecuador was 8%. The rate rose dramatically in five stages to 23%, the rate in effect in 1984. Modifications to the interest rates were accomplished by resolutions issued by the Ecuadorian Monetary Board. The resolutions encompassed a wide range of transactions and set varying rates for each, including such diverse items as interest payable on savings passbooks, mortgage bonds, development bonds, obligations of the central and provincial governments, interbank transactions, and various credit operations.

Article 8 of a typical resolution read: "The provisions of the present Regulation shall apply only to the acts and contracts entered into from and including the date it is published in the Registro Official. Therefore, the types of interest rates stipulated in the acts and contracts entered into prior to that date, be they drawn or to be drawn, shall continue in effect until the expiration date agreed upon in the respective act or contract."

The resolutions applied to many different types of transactions and not merely to causes of action in court. The resolutions' language must be read against their background of broad application.

In 1975, the Monetary Board issued Resolution 755 which fixed the legal interest rate at 8%. Defendants aver that this rate should apply to the entire breach of contract judgment. The district court disagreed and applied a segmented interest rate reflecting the five successive increases in the Ecuadorian legal rate.

The court acknowledged the Resolution's statement that the new rates were to apply only to agreements entered into after the date of the Resolution's publication, but held the restriction was limited to contracts providing a stipulated rate of

interest. Because the contract here contained no such stipulation, the prejudgment interest rate was increased as the legal rate rose.

In so ruling, the court accepted the views of Phoenix's expert and rejected those of the defendants' experts. The court also declined to follow a decision of the Supreme Court of Ecuador, *Segovia v. Acosta*, Judgment No. 341, Third Chamber, November 11, 1977, which presented a similar factual situation. The district court observed correctly the lack of precedential effect of judicial decisions in civil law jurisdictions.

We find no reversible error in the district court's ruling on prejudgment interest. The court properly reasoned that if the arrearages had been paid promptly, Phoenix could have taken advantage of the rising legal rates of interest in Ecuador. Pursuant to Resolution 11927, Phoenix was compelled to invest half of its after-tax royalty proceeds in Ecuador and, thus, would surely have profited from the soaring legal rates. "Prejudgment interest serves to compensate for the loss of use of money due as damages from the time the claim accrues until judgment is entered, thereby achieving full compensation for the injury those damages are intended to redress." *West Virginia v. United States*, ___ U.S. ___, ___, 107 S. Ct. 702, 706 n.2 (1987).

IV. *SUMMARY*

We will affirm the judgment in favor of Phoenix for breach of contract arising out of payments due for the last quarter of 1973 and the first two quarters of 1974. On that claim, we will vacate the judgment in favor of the parent Gulf Oil Corporation (now, by change of name, Chevron U.S.A., Inc.) and remand for further proceedings consistent with this opinion. We will affirm the district court's award and calculation of

prejudgment interest. Because of the automatic stay under the Bankruptcy Code, we will not enter any dispositive order as to Texaco, Inc. at this time. We will affirm all the remaining judgments in favor of defendants.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

(A.O. U.S. Courts. G.M.C. Printing, Phila., Pa. 215-568-4264)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 87-3375 and 87-3389

PHOENIX CANADA OIL COMPANY LIMITED,

Appellant in No. 87-3389

v.

TEXACO, INC., TEXACO PETROLEUM COMPANY, ECUADORIAN GULF OIL COMPANY, AND GULF OIL CORPORATION, NOW, BY CHANGE OF NAME, CHEVRON, U.S.A., INC.

Texaco Petroleum Company and Ecuadorian Gulf Oil Company, Appellants in No. 87-3375

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE
(D.C. Civil No. 76-421)

Present: WEIS, HIGGINBOTHAM and ROSENN, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of Delaware and was argued by counsel December 3, 1987.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered May 4, 1987, be, and the same is hereby affirmed insofar as the said judgment was in favor of Phoenix for breach of contract arising out of payments due for the last quarter of 1973 and the first two quarters of 1974, on that claim we will vacate the judgment in favor of the parent Gulf Oil Corporation (now, by change of name, Chevron U.S.A., Inc.) and the cause will be remanded to the said District Court for further proceedings consistent with the opinion of this Court.

It is further ordered and adjudged that the said judgment is affirmed insofar as the award and calculation of prejudgment interest. Because of the automatic stay under the Bankruptcy

Code, this Court will not enter any dispositive order as to Texaco, Inc. at this time. All remaining judgments in favor of defendants are affirmed. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/

Clerk

March 30, 1988

Certified as a true copy and issued in lieu of a formal mandate on May 4, 1988.

Test: /s/

Clerk, U.S. Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 87-3375 and 87-3389

PHOENIX CANADA OIL COMPANY LIMITED,

Appellant in No. 87-3389

v.

TEXACO, INC., TEXACO PETROLEUM COMPANY, EQUADORIAN GULF OIL COMPANY, AND GULF OIL CORPORATION, NOW, BY CHANGE OF NAME, CHEVRON, U.S.A., INC.

Texaco Petroleum Company and Equadorian Gulf Oil Company, Appellants in No. 87-3375

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE
(D.C. Civil No. 76-421)

Before: WEIS*, HIGGINBOTHAM, and ROSENN, Circuit Judges

ORDER AMENDING OPINION

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*At the time of oral argument on this appeal, Honorable Joseph F. Weis, Jr. was an active circuit judge. Judge Weis has since taken senior status.

The first paragraph on page 13 of the Opinion is deleted and the following is to be substituted:

To succeed on this cause of action, a plaintiff must thus prove that the defendant experienced an enrichment, and that this enrichment is unjust or illegitimate. Moreover, the defendant's increase must correspond to the plaintiff's becoming poorer: a causal relationship must exist between the defendant's enrichment and the plaintiff's loss. Id.

BY THE COURT,
JOSEPH F. WEIS, JR.

Circuit Judge

Date: April 26, 1988

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 87-3375 and 87-3389

PHOENIX CANADA OIL COMPANY, LIMITED,

Appellant

v.

TEXACO, INC., TEXACO PETROLEUM COMPANY, ECUADORIAN GULF OIL COMPANY, AND GULF OIL CORPORATION, NOW, BY CHANGE OF NAME, CHEVRON, U.S.A., INC.

(D.C. Civil No. 76-421)

SUR PETITION FOR REHEARING

Present: GIBBONS, Chief Judge, SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA and COWEN, Circuit Judges.

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who

participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court in banc, is denied.

BY THE COURT,

/s/ A. Leon Higginbotham
Circuit Judge

Dated: April 26, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

PHOENIX CANADA OIL COMPANY LIMITED, Plaintiff, v. TEXACO, INC., TEXACO PETROLEUM COMPANY and ECUADORIAN GULF OIL COMPANY, and GULF OIL CORPORATION (now, by change of name, CHEVRON U.S.A. INC.), Defendants.	)	Civil Action No. 76-421-JRR OPINION

Wilmington, Delaware
March 13, 1987

ROTH, District Judge

This is a diversity action, brought more than ten years ago by plaintiff, Phoenix Canada Oil Company Ltd. ("Phoenix"), claiming breach of contract, unjust enrichment, and intentional infliction of economic distress by defendants, Texaco, Inc. ("Texaco"), Gulf Oil Corporation, now by change of name Chevron U.S.A., Inc. ("Gulf"), Texaco Petroleum Company ("Texaco

Ecuador"), a Delaware corporate subsidiary of Texaco, and Ecuadorian Gulf Oil Company ("Gulf Ecuador"), a Delaware corporate subsidiary of Gulf. The litigation arose from an agreement ("the 1965 Contract") by which Phoenix and Norsul Oil and Mining, Ltd. ("Norsul") assigned to Texaco Ecuador and Gulf Ecuador the rights to explore for and exploit petroleum reserves in a concession area in eastern Ecuador, in return for a payment of $100,000 plus two percent of the value of net production of crude oil and natural gas.

There have been a number of prior decisions in this case, both reported and unreported, which have narrowed and defined the issues. In Phoenix I, 78 F.R.D. 445 (D.Del. 1978), the Court considered and denied both defendants' motion to dismiss on the basis of forum

non conveniens and the doctrines of act of state and foreign government compulsion and plaintiff's motion for partial summary judgment.

In Phoenix II, 560 F.Supp. 1372 (D.Del. 1983), the Court took up defendants' motion for summary judgment. On the breach of contract claim, the court granted defendants' motion, ruling that Ecuadorian law applied and that defendants did not breach the 1965 contract when Texaco Ecuador and Gulf Ecuador stopped making the two percent payments on portions of their concession areas which were acquired by the Ecuadorian State Petroleum Corporation ("CEPE").

The Court further ruled in Phoenix II that plaintiff's claim, based on the allegation that defendants engaged in a continuing scheme to destroy plaintiff as an economic entity, was barred by the

Delaware statute of limitations, 10 Del.C. §1806, since none of the acts which would give rise to a cognizable cause of action had occurred within the three years preceding the filing of suit.

Finally, the Court denied summary judgment on the unjust enrichment claim, holding that Ecuadorian law applied, that there was a reasonable basis to conclude that Ecuadorian law recognized the concept of unjust enrichment, and that there were issues of material fact as to whether CEPE's compensation to Texaco Ecuador and Gulf Ecuador for the acquisition of its interest in the concession area reflected only the depreciated value of assets and equipment, or included compensation for production rights, and, if so, as to whether defendants had received a benefit from the

transfer to CEPE.

In Phoenix III, C.A. 76-142 (D.Del., July 20, 1984), the Court ruled that, if an Ecuadorian court were to allow a general unjust enrichment cause of action, the court would apply an action "de in rem verso", which action is comprised of five elements: (1) enrichment of defendants, (2) loss to plaintiff, (3) lack of justification for the enrichment, (4) no other available remedy, and (5) absence of law barring the remedy. Phoenix III, slip. op. at 11. The Court also considered in this Memorandum Opinion, plaintiff's claim that defendants miscalculated the two percent payments during three quarters in 1973 and 1974. The Court held that there was no miscalculation. However, this latter ruling was vacated on June 11, 1985, and the claim for the three

miscalculated quarterly payments was reinstated.

Trial on the claims of unjust enrichment and of underpayment for the three quarterly periods was held in September 1986. The Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT.

The incidents which gave rise to this litigation took place for the most part in Ecuador, a South American country which straddles the Equator. Ecuador has three major geographic regions: the lowlands of the Pacific coast, the Andes highlands where the capital, Quito, is located at an elevation of 9,200 feet, and the Oriente or eastern lowlands, a sparsely populated area, including the eastern slopes of the Andes and part of the Amazon river

basin.

There had been unsuccessful exploration for oil in the Oriente in the 1920's and the 1940's. Oil exploration began again in the region in 1961. In July 1961, the Government of Ecuador granted a concession to Minas y Petroleos del Ecuador ("Minas")[1] to explore for petroleum reserves and to exploit them, if discovered, in 4,350,000 hectares (approximately 10,744,500 acres or 16,788 square miles) in the Napo, Pastaza, and Morona Santiago provinces of the Oriente region ("1961 Concession"). The grant of the 1961 Concession to Minas by the Government of Ecuador was authorized by Decree 1401, which set out the terms and conditions of the concession contract (the "1961

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[1]Minas was organized as a corporation under the laws of Ecuador in 1960.

Contract").

Plaintiff Phoenix's involvement with the Ecuadorian concession goes back to 1961 when one Howard Steven Strouth approached S. Donald Moore, president and sole operating officer of Phoenix, in order to acquire a public company to facilitate the financing of Minas's operations. Moore introduced Strouth to the principals of a small Canadian corporation, then dormant. Strouth's group acquired a controlling interest in that company, Norsul Oil and Mining, Ltd. Minas then became Norsul's wholly owned subsidiary. From 1961 to 1971 Strouth was Norsul's major stockholder, Managing Director, and principal operating officer.

Phoenix did not itself contribute to Minas's operations in 1961. However, in 1963, Strouth again approached

Phoenix to become a participant in the venture. He met with Moore in Calgary in early 1963. As a result of that meeting, Phoenix agreed to contribute certain funds to the maintenance of the concession area and further agreed that Moore would contribute oil industry expertise to Norsul, all in consideration of an undivided 30 percent interest in the concession area. According to Moore, Phoenix's interest was later increased to 60 percent.[2]

The 1961 Contract required that Minas make certain minimum yearly investments for exploration and exploitation operations and that it pay annual surface taxes. Minas did not have the capital to undertake an extensive exploration program in the area. Instead,

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[2]T-212 (Trial Transcript is designated "T" plus page number).

Strouth hoped to interest a large oil company in purchasing the concession from Minas. Because Minas failed to do the required exploratory work, was habitually in arrears in meeting its financial obligations, and engaged in speculative activities, the 1961 Contract was in danger during the early 1960's of being cancelled by the Government of Ecuador.

In 1964, defendants Gulf and Texaco, through Ecuadorian subsidiaries, also became involved in exploring for oil in the Oriente. The Government granted them the Napo Concession, which adjoined the Minas 1961 Concession on the north. During 1964 there were contacts between Minas and defendants concerning the possibility of a joint survey of the boundary between the Minas and Napo concessions and the acquisition

by defendants of part of the Minas concession.

In January 1965, Moore arranged with Max Crawford of Texaco to meet in Trinidad to discuss a new proposal for participation by defendants in the Minas 1961 concession. Moore met with one of Texaco's principal geologists, a Mr. Martin, on January 27 to present a proposal for Gulf and Texaco to acquire a portion of the 1961 Concession. Moore took the position that because Phoenix owned 60 percent of Minas, he was the person with whom to negotiate concerning the 1961 Concession. Strouth at the same time contended that Norsul owned all the shares of Minas and that he was the one to deal with. After looking into the matter, Texaco decided to negotiate with Strouth.

Strouth had moved to Quito as a result of a condition imposed by Phoenix when it began its participation in the Minas 1961 Concession venture. In early 1965, Strouth began discussions in Quito with representatives of Texaco. On April 1, 1965, Max Crawford made an offer by letter on behalf of Texaco and Gulf to acquire from Minas 500,000 hectares of the 1961 Concession in return for a cash payment plus an overriding royalty for any production developed and exploited. This transaction would be subject to the approval of the Government of Ecuador.[3]

On July 16, 1965, Compania Texaco de Petroleos del Ecuador, C.A. ("Texaco del Ecuador"), an Ecuadorian subsidiary of Texaco Ecuador, and Gulf Ecuatoriana

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[3]PTX 4 (Plaintiff's Trial Exhibits are designated "PTX"; Defendants' Trial Exhibits, "DTX".)

de Petroleo, S.A. ("Gulf Ecuatoriana"), and Ecuadorian subsidiary of Gulf Ecuador, contracted with Minas to acquire a portion of Minas's interest in the 1961 Concession. This area, comprising 650,000 hectares directly south and east of the Napo Concession, has become known as the Transfer Zone or the Coca Concession. Moore did not participate in the negotiation of this contract (the "1965 Contract"). Strouth, not Moore, signed the contract on behalf of Minas.

The 1965 Contract provided that Minas assign its interests in the Transfer Zone to Texaco del Ecuador and Gulf Ecuatoriana, or their designees, in exchange for a payment of $15,000 at the signing of the contract and a further $85,000 when the Government of Ecuador approved the transfer and for payments, when and if exploitation of oil began in

the Transfer Zone, of two percent of the value of net production of all crude oil and natural gas from the area.[4]

The transferees sought approval of the assignment by the Government of Ecuador by presenting to the government a document executed by Minas along with a proposed instrument of conveyance. These two documents were designated Attachments No. 1 and 2 to the 1965 Contract. Attachment No. 1, the instrument of conveyance, recited the consideration for the transfer as $15,000. No mention is made in either attachment of the $85,000 or the two percent payments. The 1965 Contract itself was not submitted to the Government in connection with

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[4]DTX 12A. The remainder of Minas's 1961 Concession was declared forfeit by the Government of Ecuador on February 27, 1973.

the request for approval of the conveyance.[5]

The Government of Ecuador issued its approval of the transfer on December 20, 1965, in Resolution No. 844.

In January 1969, defendants publicly announced the first oil discovery in the Transfer Zone. Actual production began in about May 1972. In order, however, to transport the Oriente crude out to market, it was necessary to build a pipeline over the Andes mountains, down to the Pacific coast. Texaco Ecuador

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[5]When in 1973 the then-Minister of Natural Resources and Energy, Jarrin, learned of the terms of the 1965 Contract, particularly the two percent payments, he considered the contract irregular and the two percent payments an illegal division of the resources of the sub-soil, which belonged to the State. Jarrin wanted any such payments to be declared null and void. Instead, the Government of Ecuador imposed an 86 percent tax on them. Jarrin D52-54, 61-64. (Deposition references are designated by the name of the deponent with "D" plus the page number.)

and Gulf Ecuador designed and built the 318 mile pipeline, the highest major pipeline in the world, at a cost of $108,000,000.

In June 1969, within seven months of the discovery of oil in the Oriente region, the Government of Ecuador required renegotiation of the concession contracts. Decree 1324, issued on June 26, 1969, significantly changed the terms of the contract regulating exploitation of the Transfer Zone and Decree 1323, those of the Napo Concession. Each concession was reduced to 500,000 hectares in size, which took 150,000 hectares from the Transfer Zone and 900,000 hectares from the Napo Concession. Defendants were permitted to select the areas to give back; however, they were not compensated by the Government for the areas relinquished or for

the rights to explore for and produce crude oil in those areas. In addition, Decree 1324 raised the royalties paid to the Government on Transfer Zone oil from 6 percent to 11.5 percent.[6]

On September 27, 1971, the Government of Ecuador enacted a new hydrocarbons law (the "1971 Law"), which replaced the 1937 Petroleum Law.[7] Article 1 of the 1971 Law set out the basic con-

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[6]The Government had originally sought in January 1969 to raise the royalty to 15 percent. PTX 287. In June 1965, Crawford of Texaco stated in a memo to the Texaco Chairman, in which he was discussing the conveyance to defendants of the Transfer Zone, that he expected that the Government of Ecuador, before it approved the transfer, would insist upon renegotiation of many of the terms of the Minas Contract as it applied to the area to be acquired by Texaco. The likelihood of renegotiation appeared, therefore, to have been recognized by defendants even before the discovery of oil.

[7]The 1961 Concession and the 1965 Contract had come into effect under the provisions of the 1937 Petroleum Law.

cept of the Government of Ecuador, concerning the petroleum resources in Ecuador:

> The deposits of hydrocarbons and accompanying substances, in whatever physical state, located in the national territory, including the areas covered by territorial sea water, belong to the inalienable and imprescriptible patrimony of the State.[8]

The 1971 Hydrocarbons Law, as originally promulgated, did not apply to contracts already in existence. It provided for much more onerous terms to be incorporated in concession contracts executed after it became effective. These provisions included a maximum concession area not to exceed 200,000 hectares, with the exploitation area not to exceed 160,000 hectares, a surface tax starting at 10 sucres a year per hectare (.40¢) and rising, after five years of

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[8]DTX 40B.

exploitation to 100 sucres per hectare ($4),[9] and a government royalty of 16 percent. The new law permitted the Government to compute royalties and income taxes by a "reference price" which would be uniform for all producers. The reference price would be set by agreement with the producers or unilaterally by the Government. Factors such as the grade of the oil, the condition of the Ecuadorian oil industry, world market conditions, other countries' reference prices, transportation costs, and other pertinent factors would be taken into account in setting the reference price. The 1971 Law specifically provided, however, that if the actual sales prices

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[9]DTX 40B, Chap. V., Art. 43, 45. This compares to a surface tax under the 1961 Concession Contract starting at $4000 for the 4,350,000 hectares (less than .1¢ per hectare) and rising after eight years to $16,000 (.37¢ per hectare).

were ever higher than the reference price, the assessments would be calculated on the basis of the actual sales price.[10]

The 1971 Law also provided for Government participation in oil production by means of "association contracts" under which CEPE would be a party.

In February 1972, a military government took power in Ecuador. The head of the new government, General Guillermo Rodriguez Lara, appointed Navy Captain Gustavo Jarrin Ampudia to be Minister of Natural Resources and Energy. Captain

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[10]DTX 40B, Chap. VII, Art. 65. Under the 1961 Concession Contract, the Government royalty was computed on the world market price of a similar grade of Texas crude, plus the pipeline tariff for Texas crude to the nearest exporting port, minus the cost of transporting Ecuadorian crude from Guayaquil to the port of New York, and minus the cost, including depreciation of plants, pipelines and equipment, of transporting crude from the Oriente to Guayaquil, DTX 3B, Cl. 26.

Jarrin served as Minister from February 1972 until October 1974. During that time he established the oil policies of the Government of Ecuador and was responsible for implementing them.

The military government continued to adhere to the belief of its predecessors that the deposits of hydrocarbons were the inalienable and imprescriptible patrimony of the people of Ecuador. To ensure greater participation of Ecuador in the exploitation of its petroleum reserves, however, the military government turned from the predecessor Ibarra government's policy of prospective participation and enacted means to implement participation in pre-1971 Law concessions. By Supreme Decree 430,[11]

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[11]Under Ecuadorian law, a "Supreme Decree" is issued by a president who has dictatorial authority with legislative, as well as executive powers. Supreme Decrees have the characteristics of law,

(continued...)

issued on June 6, 1972, the military government ruled that the 1971 Law would be retroactively applied to all concession contracts entered into before that law was promulgated. All such concessionaires were required by Clause Sixth of Supreme Decree 430 to "sign new contracts, within a year counted from the enactment of this Law, of a single type, and which shall be similar for all." Supreme Decree 430 also required companies, which were in the exploitation period of their contract and which held more than the maximum concession area allowed by the 1971 Law, to return 60 percent of the area in excess of the

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[11](...continued)
prevailing over all other provisions of public or private law, which they may oppose. DTX 47B, Art. 2; T-1865-1866.

maximum.[12] The return of acreage was to be in the shape of rectangles with a surface of no less than 20,000 hectares. Finally, Supreme Decree 430 provided in Clause Seventh that the "Minister of Natural Resources and Tourism, shall declare caducity (forfeiture) of the contract of the concessionaires ... that would oppose either totally or partially the application of these provisions...." Because of this caducity provision, defendants, who had invested some $260,000,000 in Ecuador and who were just at the production start-up point, did not challenge the legality of Supreme Decree 430.

As required by Supreme Decree 430, defendants relinquished substantial

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[12]DTX 47B, Cl. 2. Under Article 19 of the 1971 Law, the maximum acreage allowed during the exploitation period was 160,000 hectares. DTX 40B.

acreage to the Government at the end of December 1972. Because the area returned had to be in rectangular blocks of 20,000 hectares, some of that acreage contained proven reserves or wells which had tested for oil. CEPE exploited the profitable portions of the relinquished area and by 1982 was producing at least 20,000 barrels of oil a day from them. The Government of Ecuador did not compensate defendants for the reserves, the rights or the future production or profits they were required to relinquish. In January 1973, defendants requested indemnification from the Government for the area that was turned back. The request was rejected. Minister Jarrin announced that:

> The return of areas to the Ecuadorian State corresponds to the application of the Hydrocarbons Law and of the Supreme Decree Number 430, which safeguard the inalien-

> able interests of the Nation....
>
> [T]he Ministry of Natural Resources declares in a definite and emphatic way that it does not accept nor shall accept any request for indemnification because it is not covered by the legal provisions in force nor by the petroleum policy encouraged by the Nationalistic and Revolutionary Government of the Armed Forces.[13]

In the meantime, with commercial production of oil from the Transfer Zone imminent, questions concerning the two percent payments under the 1965 Contract needed to be resolved. First of all, in 1967 Phoenix had filed a lawsuit against Norsul in the Province of Alberta, Canada, seeking a judicial determination of Phoenix's percentage interest in the two percent payments and in Minas. In addition, between 1965 and 1971, Strouth had filed in the courts of Ecuador a

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[13]DTX 347.

series of instruments assigning Minas's interest in the two percent payments to Petromin, S.A., and West Coast Petroleum, Inc., entities controlled by Strouth.[14]

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[14]Moore, in a November 12, 1971, letter to Texaco, described Strouth's activities in filing these assignments as "paperhanging." DTX 41. Moore, in a February 19, 1973, letter to Texaco, further portrayed Strouth's activities as "the unfortunate actions of our mutual Quito nemesis." DTX 82. Moore, in his trial testimony, expanded on this description:

> What unfortunate actions were you referring to, Mr. Moore?
>
> A. Mr. Strouth was a local character who received considerable publicity by way of his dress, including a monocle and a cape, by way of his pronouncements, by way of his parties, by way of his high profile, which caused problems, if there were any problems, in the matter of his actions, yes.
>
> Q. Among the unfortunate actions of Mr. Strouth were statements he made that antagonized Government offi-
>
> (continued...)

In 1971, a group of investors from Albany, Georgia, bought Norsul from Strouth for $130,000, plus four non-interest bearing notes of $55,000 each. Also, in August 1971 Phoenix settled its lawsuit against Norsul by dividing all of Norsul's assets in Ecuador, including the two percent payments, equally between Phoenix and Norsul. When the two percent payments began, Norsul and Phoenix would each receive half, or one percent.

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[14](...continued)
cials, particularly those in the Ministry of Natural Resources; correct?

A. I wouldn't say particularly. He antagonized everybody he came in contact with. T-380.

Minister Jarrin particularly disliked and distrusted Strouth, considering him to be corrupt and to be profiting irregularly from the petroleum wealth of the State.

In October 1971, C. Dixon Oxford, the new president of Norsul, and B.C. Gardner, an attorney and vice president of Norsul, contacted Texaco in order to obtain an acknowledgment of some type from Gulf and Texaco that Norsul and Phoenix were the owners of the royalty on the Transfer Zone. The Norsul representatives were told that Texaco would be willing to discuss how such problems would be worked out so as to leave a clear record regarding payment of the royalty.

A meeting was held at Texaco corporate headquarters in New York City on November 9, 1971, between Norsul, Phoenix, Gulf and Texaco to work out the title documentation which Texaco and Gulf would require before they would make the two percent payments to Phoenix and Norsul. Moore met with Texaco rep-

resentatives in New York on December 15, 1971, again to determine what documentation Texaco wished to receive in connection with Minas's interests. By June 23, 1972, defendants appeared to be satisfied that Phoenix and Norsul had produced adequate documentation to support their claim that they were now the owners of the two percent production payments.

Defendants also came to the conclusion that the price for calculating the two percent payments had to be renegotiated with Norsul and Phoenix. A November 22, 1972, Texaco memorandum reflected this position: that the original contract provision had been frustrated since the "government royalty", which was the basis for calculating under the 1965 Contract, had been a bilaterally established reference price

and the amount of the government royalty was now unilaterally set by the Government of Ecuador. A meeting of Texaco, Gulf and Norsul representatives was held at Texaco's Coral Gables, Florida, office on November 27, 1972, to discuss this issue. An agreement to set a new basis for the two percent payment for a period extending through March 31, 1973, was reached by those present. A copy of the agreement was mailed to Moore. After much further discussion, in early 1973 an Interim Agreement was arrived at for the last two quarterly payments of 1972 and the first quarterly payment of 1973. The Interim Agreement specifically provided that the parties were not waiving any rights under the 1965 Contract. The Agreement was executed by Phoenix as of February 5, 1973, and by Norsul, Texaco and Gulf as of February

7, 1973.

Immediately after the Interim Agreement was signed, Texaco notified Phoenix and Norsul that its Quito office was being instructed to make the two percent payments for the third and fourth quarters of 1972. At this point, however, Minister Jarrin became aware of the two percent payments. On February 22, 1973, Jarrin wrote to the Minister of Finance, requesting that the two percent payments be prohibited:

> [A]s it is known that the percentages agreed upon as a kind of royalty have no legal basis whatsoever and have not yet been satisfied by those subject to the obligations, I am requesting you to take the appropriate measures to recover the revenues due the Nation and to study the means for issuing a Special Decree, which would leave without effect the percentages illegally agreed upon and to dispose of

those funds for purposes which best serve the country.[15]

On February 23, 1973, Jarrin instructed defendants to suspend any payment of the two percent to Phoenix and Norsul.

Jarrin did not succeed in having the two percent payments cancelled or confiscated. However, the outcome was close to this result. On May 29, 1973, Decree 602 was issued, placing an 86 percent tax on all income generated by premiums, percentages or other kinds of participations given for assignments or transfers of mining or hydrocarbons concessions. The tax was retroactive to include past payments.

After the promulgation of Decree 602, Texaco Ecuador and Gulf Ecuador made the 14 percent after-tax portion of

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[15]DTX 86B.

the two percent payments to Phoenix and Norsul for the third and fourth quarters of 1972 and the first quarter of 1973. the 86 percent tax was paid directly to the Development Bank, pursuant to Decree 602.

The parties agreed to extend the provision of the Interim Agreement to cover the calculation of the two percent payments for the second and third quarters of 1973. Then, in October 1973, war broke out in the Middle East and world oil prices, as well as the Ecuadorian Government reference price, began to rise dramatically. The parties could not agree on the basis for calculating the two percent payments for the fourth quarter of 1973. At the same time, a new problem appeared which further complicated the resolution of the problems with the two percent payments: the

negotiation of new concession contracts, required by Supreme Decree 430.

In February 1973, the Ministry of Natural Resources had presented defendants with the draft of a new Model Contract. This proposed contract did far more than just alter the 1962 Contract to conform to the 1971 Law. It contained certain provisions which were much more onerous and which defendants found unacceptable. These included an option for CEPE to participate in Texaco Ecuador and Gulf Ecuador's operations by purchasing stock at par value. Defendants were strongly opposed to this idea because par value was extremely low. CEPE would acquire its interest for practically nothing. Furthermore, the aim of the Government of Ecuador was to achieve participation in the exploitation and marketing of Ecuador's oil re-

sources, a goal which stock ownership in American corporations would not accomplish. Defendants feared that, as soon as the Government realized this, the Ecuadorians would turn around and force participation on the companies. Texaco Ecuador and Gulf Ecuador would then "have the worst of both worlds": the Government of Ecuador as a stockholder in the company and the Government oil company as a partner in the oil operation.[16]

Other provisions which defendants found to be particularly troublesome were a reduction in the term of the contract, an expansion of "internal consumption crude" to include crude supplied to an Ecuadorian export

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[16]T-1286 (Shields).

refinery,[17] and a reference price which was unilaterally set by the Government, without any requirement that cost or world price be considered.

Minister Jarrin was unwilling to negotiate the terms of the model contract since it was to be promulgated legislatively by decree. Defendants were able to discuss some of the proposed provisions with the Ministry. They did not, however, succeed in adjusting all the problems they foresaw. The Model Contract was published on March 27, 1973, as Decree 317. It no longer provided for CEPE to acquire stock ownership in the operating companies. Instead, it required conces-

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[17]"Internal consumption crude" had to be sold at a price unilaterally set by the Ministry, which was far below the market price and ultimately even below the royalty paid by defendants to the Government on such crude.

sionaire companies to make a future conveyance to CEPE of an undivided interest in an as yet to be determined percentage of their rights, obligations and properties. Defendants were not able to ameliorate the other troublesome provisions of the model contract.

Texaco Ecuador and Gulf Ecuador would now be required to enter into a new contract, conforming to the Model Contract, for the Transfer Zone. The only negotiation possible would be over a few blank spaces, such as the percentage and starting date of CEPE's participation and the beginning and termination dates of the exploitation period. The new contract would call for a 16 percent royalty which the companies were, in fact, already paying.

Texaco Ecuador summed up the new situation as follows:

> The signing of the new contract will sever our relationship with the old [1961] contract where we had basic essential protection against arbitrary Government rulings. The new contract exposes us to the rulings of the Government which could make the operation uneconomic at any time with almost no recourse. Again, this is now in the form of a law and cannot be avoided without a direct confrontation. We reluctantly conclude it must be accepted and so recommend.[18]

In June 1973, just a few months after the promulgation of the Model Contract, Ecuador became a non-voting member of the Organization of Petroleum Exporting Countries ("OPEC"). It became a voting member five months later. After joining OPEC, the Government of Ecuador considered itself obligated to comply with OPEC policy. Such policies were set out in published resolutions, which provided, for example, that OPEC

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[18]DTX 108.

member nations would endeavor as far as feasible to explore for and develop their hydrocarbon resources directly; that terms and conditions of existing concession contracts would be open to revision at predetermined intervals; that financial provisions of concession contracts which resulted in excessively high net earnings would be open to renegotiation, or if the operator declined to negotiate, excessive amounts of earnings would be estimated by the Government, OPEC Resolution XIV.90; and that all Member Countries would establish negotiations with the oil companies to achieve effective participation by the Member Countries in existing oil concessions, OPEC Resolution XXV.139.

Shortly after Ecuador joined OPEC, the Government, on August 4, 1973, published Decree 925 which set out all the

terms and conditions of the new Model Contract which Texaco Ecuador and Gulf Ecuador would be required to enter into, pursuant to Supreme Decree 430 (the "1973 Contract"). The 1973 Contract was signed by Texaco Ecuador and Gulf Ecuador on August 6, 1973.

Clause 52 of the 1973 Contract granted CEPE the option to acquire up to a 25 percent participation in the "rights and actions conferred in the present contract and of the assets conferred in the present contract and of the assets acquired by the contractors for the purpose of this agreement...." The consideration to be paid for this participation was described as "the value of the respective rights, assets and obligations in accordance with the terms and conditions to be determined by the parties." If CEPE elected to exer-

cise its option, "it shall give notice within 90 days prior to June 6, 1977."

The 1973 Contract, by Clause 53, replaced defendants' concession contracts, including the 1961 Contract. It also consolidated the Transfer Zone and Napo Concession areas within its coverage. It included all of the provisions of the Model Contract, which defendants found troublesome, including a tax reference price unilaterally set by the Government, reduction of the exploitation period in the Transfer Zone and an open-ended internal consumption crude requirement.

The Government of Ecuador did not pay defendants any compensation for the oil production or the right to extract oil which was lost by the shortening of the exploitation period. Minister Jarrin testified at his deposition that

the Government paid nothing for the reduction in the term of the concession.

> How was the Government going to pay any amount over the wealth of the subsoil which, according to the law, is inalienable, and indescriptable [sic]? It belongs to the State. It did not have to pay anything. It did not have to pay for something that was its own property.[19]

Dr. Luis Arauz, legal adviser to Minister Jarrin, concurred in this opinion:

> It had no reason to pay. It was a mandate of the law. It was an act of full sovereignty so that it did not pay one single cent and it had no reason to do so.[20]

Although the 1973 Contract provided for CEPE to acquire its participatory interest in June 1977, the Government of Ecuador decided to accelerate that participation. On January 2, 1974, Supreme

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[19]Jarrin D-41.

[20]Arauz D-65.

Decree 9 was issued. This decree cited the OPEC policy of achieving government participation in the property of the oil companies and declared that Minister Jarrin would commence negotiations with Texaco Ecuador and Gulf Ecuador "for the purpose of making effective during the course of the present year, the option of participation of CEPE in the 25 percent of the rights conferred in the contract entered into for the exploration and exploitation of hydrocarbons and in the assets acquired by the contractors for purposes of said contract."

Robert Shields, who was Chairman and Chief Executive Officer of Texaco Ecuador at that time, testified at trial that, when Decree 9 came out, he did give consideration to opposing its application to Texaco Ecuador and Gulf Ecuador. He concluded that any such

opposition would be "totally counterproductive."

> It would result in, at worst, caducity, and, at best, a decreed participation, probably in excess of the 25 percent, mostly [sic] in excess of 50 percent."[21]

Defendants decided that, in negotiating with the Government of Ecuador for the compensation to be paid for CEPE's 25 percent participation, they would seek payment for 25 percent of the unamortized producing and pipeline assets on the books of Texaco Ecuador and Gulf Ecuador, updated to current value, plus the right to 25 percent of production in the concession area for the period 1974 through 1977, when the CEPE option was supposed to be exercisable under the 1973 Contract.[22] Shields was

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[21]T-1301.

[22]T-1302-03.

of the opinion that the Government would pay nothing for rights, but only for unrecovered investment.

Defendants presented their request to the Government to be compensated for unamortized assets at updated book value and for the loss of their rights to 25 percent of the crude produced from the area for the period 1974 to 1977. The Government at the outset informed defendants that CEPE would begin its 25 percent participation on June 6, 1974, whether or not there was an agreement on compensation. June 6 was the second anniversary of Supreme Decree 430, a day of patriotic significance.

Negotiations were not a dialogue. The government told defendants that they would be compensated for the net book value or the unrecovered actual investment in producing and pipeline assets.

Defendants' request to be paid for their lost rights in production for the period 1974-1977 was rejected out of hand. Minister Jarrin set out this position at his deposition.

> Q. Did the Government of Ecuador pay any compensation or consideration to the companies Texaco [Ecuador] or ... Gulf [Ecuador] when it decided to accelerate the option for CEPE's participation by three years?
>
> A. No, sir. The Government of Ecuador determined and we established this policy in general terms, that we would only pay for the investments in book value, those investments that were not yet amortized.
>
> Q. For what reason or reasons did the Government not compensate Texaco [Ecuador] and ... Gulf [Ecuador] when it accelerated the option for CEPE's participation by three years?
>
> A. Well, a very simple reason. Because the country is the owner of its resources. All of the wealth of the subsoil according to the law, is the inalienable and inprescribable patrimony of the

State and no one can -- it is the patrimony of the State. This means that it can -- it never prescribes, it never ends, and it cannot be alienated. I repeat once again?

Q. Go ahead.

A. I was saying that in accordance with the law, the resources of the subsoil, especially the hydrocarbon resources, are the patrimony -- the inalienable and inprescriptable patrimony of the people of Ecuador. This means that it never prescribes and it can never be alienated. And if it was ever alienated, the Government may recover it at any given time....

If I correctly understood the question, the Government of Ecuador, when it enforced the option or put it into force the option for CEPE to enter with 25 percent as participating within the contract signed with the consortium Texaco-Gulf, it determined, as policy, that only it would pay for those investments that were not amortized yet. There was no right to be paid, nor any profit, no benefits foregone of any type. This is a resource of the subsoil that belongs to the people of Ecuador and to the Government of Ecuador, and it

> does not have to pay for any benefits foregone or profits in the future to anyone.[23]

Minister Jarrin, in his capacity as Minister of Natural Resources, decided exactly how much the Government would pay Texaco Ecuador and Gulf Ecuador in compensation for CEPE's acquisition of its 25 percent participation, and what it would pay for. As he testified at his deposition: "I was responsible and I implemented oil policy and I established it."[24]

The decision of the Government of Ecuador to pay Texaco Ecuador and Gulf Ecuador only for the depreciated value of their investments in the concession area, reflected the policies and practices of OPEC. According to Minister Jarrin:

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[23]Jarrin D-47-49.

[24]Jarrin D-49.

> We communicated to OPEC of the problem that we had with the companies for the new oil contracts, and we requested this support because we were putting into effect new provisions that had been discussed with OPEC in connection with nationalization of the oilfields throughout the world. And, therefore, it was the OPEC policy that payment would be made only for non-amortized investments. And we requested the support of OPEC to implement this policy in Ecuador.[25]

Dr. Arauz testified at his deposition concerning the same reasoning of the Government in determining what to pay for the acquisition by CEPE of its 25 percent participation:[1] There was no need for discussion within the Ministry; participation would be under the same terms established by OPEC, i.e., payment for the depreciated value of investments; there would be no payment for

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[25]Jarrin D-57.

exploitation rights because the State was the owner of the wealth.[26]

> It would have been immoral and it would have been very damaging to the country if the country owns the deposit, the oil. And why is it going to pay for the exploitation of its own wealth.[27]

> Q. Dr. Arauz, did the Government of Ecuador pay Texaco [Ecuador] and ... Gulf [Ecuador] for 25 percent of their investment in Ecuador when CEPE obtained a 25 percent participation?
>
> A. The Government of Ecuador paid 25 percent of the investments which are listed in Clause 3 of the Acta.
>
> Q. Now, subsequent to the effective date of the participation, CEPE received 25 percent of the oil produced in the 1973 contract area; is that correct?
>
> A. Yes. This appears in the Acta and this was a fact.
>
> Q. Did the Government of Ecuador buy from Texaco

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[26]Arauz D-73-77.

[27]Arauz D-76-77.

> [Ecuador] ... Gulf [Ecuador], the right to receive such oil?
>
> A. The Government of Ecuador and CEPE did not acquire the right because they already had it. The State was the owner. What it paid for was the investments made under the terms which appear in the Acta.
>
> Q. Did the Government of Ecuador buy from Texaco [Ecuador] and ... Gulf [Ecuador] the right to receive possible profits on oil from the 1973 contract area?
>
> [Objection omitted]
>
> A. Ecuador did not acquire or buy this right to have profits. What it bought was what appears in the Acta, the assets.[28]

Robert Shields of Texaco Ecuador, who took part in the discussions with the Ministry about the price CEPE would pay, found that the subject of production rights or interests in the oil reserves could not even be mentioned in

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[28]Arauz D-263-65.

the meetings with the Ministry.

> They wouldn't even talk to us about what the oil reserves were or the future profits, anything like that. You couldn't even get a conversation. That shut it up and started a tirade if you brought it up.[29]

On June 14, 1974, the Minister, the General Manager of CEPE, and the managers of Texaco Ecuador and Gulf Ecuador signed an Acta (minutes) which set out the terms of CEPE's 25 percent participation in the "rights and assets of the Consortium Texaco-Gulf." The price paid by CEPE was to be determined by investments and costs of equipment and materials, from which would be deducted amortization and depreciation. The exact

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[29]T-1566-67.

amount of this price was to be established by an independent audit.[30]

The international accounting firm of Peat, Marwick, Mitchell & Co. ("PMM") was selected by CEPE to perform the audit. On July 5, 1976, PMM presented its final report, concluding that, as of June 6, 1974, the book value or cost of Texaco Ecuador and Gulf Ecuador's producing assets, less depreciation and amcrtization, and the book value or cost of their materials and supplies inventory was in the total amount of approximately $182,000,000.

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[30]DTX-201. On May 22, 1975, Resolution 12560 established the conditions for the audit. Despite the provision in the June 14, 1974 Acta that the Government would pay for 25 percent of the unrecovered investment in the pipeline, Resolution 12560 provided that CEPE would not acquire an interest in the pipeline and pipeline assets were to be excluded from the audit.

The Central Bank of Ecuador paid Texaco Ecuador and Gulf Ecuador 25 percent of this amount, or $45,033,671, as follows:

Date	Payment to Texaco Ecuador	Payment to Gulf Ecuador
July 1974	$12,500,000	$12,500,000
October 1974	5,000,000	5,000,000
January 1975	2,500,000	2,500,000
June 1975	1,411,397	1,411,397
January 1978	1,002,399	---
April 1979	---	1,208,478

The total paid to Texaco Ecuador and Gulf Ecuador did not include any interest, despite the fact that payments were made over a period of almost five years.

None of the assets, materials and supplies had been paid for by Phoenix or Norsul and no part of the payments received by defendants for CEPE's partici-

pation was passed on to Phoenix or Norsul.

Three days before the June 6, 1974, acquisition by CEPE of its 25 percent share, Resolution 11927 was issued to clarify the basis for the calculation of the two percent payments to Phoenix and Norsul, and consequently of the 86 percent tax. The Resolution added an additional requirement: that henceforth one half of the 14 percent payments be retained for investment in Ecuador. Because the CEPE participation was imminent, Resolution 11927 also dealt with the impact on the two percent payments of CEPE's obtaining a 25 percent interest in the Texaco-Gulf consortium. Article 6 of Resolution 11927 provided that, as of the date of CEPE's participation, "there shall be excluded, in order to carry out the assessment of the

2% the percentage of CEPE in the net production...." It was upon this language that the Court in Phoenix II based its decision that defendants did not breach the 1965 Contract when they stopped making two percent payments on the value of CEPE's share.[31]

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[31]That Phoenix and Norsul were also of the opinion that Resolution 11927 terminated the two percent payments on CEPE's share can be seen from the April 15, 1975, letter of the Ecuadorian lawyer for Norsul (and Phoenix), Andres F. Cordova, to the then-Minister of Natural Resources, Admiral Salazar. This letter was not listed as an exhibit in the Pretrial Order. However, plaintiff moved its admission at trial as PTX 281. The translation of the letter into English is poor. The basic purposes of the letter were two: first, to request the release of a part of the seven percent of the two percent payments, which Resolution 11927 required Norsul and Phoenix to invest in Ecuador, in order that it could be used for preliminary studies and office expenses; and second, to persuade the Minister not to hold Norsul and Phoenix responsible for the outstanding debts of Minas. The letter also mentioned in passing that Resolution 11927 required that, in computing the two percent payments, the value of the CEPE participation first be sub-

(continued...)

Texaco Ecuador and Gulf Ecuador reduced the two percent payments to Phoenix and Norsul by the 25 percent of CEPE's participation as of June 6, 1974.

Resolution 11927 was challenged by Texaco Ecuador and as a result was affirmed by a Ministerial Sentencia (Judgment), issued on October 2, 1974. The Sentencia further provided in Clause 3 that the exclusion of CEPE's participation from the calculation of the two percent payment would be "valid for any increase which may be obtained in this respect." Neither Phoenix nor Norsul

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[31](...continued)
tracted. Dr. Cordova noted that this was a serious legal error, which injured Norsul's interests. The letter went on to state that, although Norsul considered this to be neither legal nor just, it had preferred not to raise this issue with the Government.

Dr. Cordova did succeed in his efforts to release investment funds and to free Norsul and Phoenix from responsibility for Minas's debts.

made any appeal to the Government of Ecuador in regard to the provisions of Resolution 11927 and the Sentencia or to the reduction of the two percent payments.

Other aspects of defendants' relationship with the Government of Ecuador became increasingly troublesome during 1974, 1975 and 1976. One problem was overretainage of incautation deposits. The oil companies were required to deposit with the Central Bank all proceeds of their export sales of crude oil, or an amount equal to its tax reference value, whichever was greater. From these deposits, the Government would deduct the taxes and royalties due it and return the rest to the companies. The Central Bank failed to calculate correctly the amounts due to the Government and retained amounts which belonged

to the oil companies. By 1976, the Government had overretained $22,000,000 of the monies due to defendants.

Internal consumption crude also was a problem. The oil companies were required to pay a royalty to the Government on internal consumption crude, based on the tax reference price. By October 1974, the royalty which defendants had to pay on each barrel was $2.22. However, the Government had unilaterally set the price it would pay for the purchase of each barrel of internal consumption crude at $1.48. Consequently, the companies actually lost money on each barrel of internal consumption crude that was sold. In addition, some of this crude was being delivered to national refineries and then exported by the Government for profit.

Between October 1974 and October 1975 the Ecuadorian income tax rate rose from 45 percent to 71.5 percent. The Government royalty on oil had also risen from six percent in 1969 to 16 percent. In November 1975, it was again increased, up to 17 percent.

The Government began restricting the amount of oil which the oil companies could produce. Then in April 1975, the Government decreed that CEPE's 25 percent participation would be based not on actual production but on a "presumed" production figure. The presumed production of 210,000 barrels a day was not only greater than actual production, it was greater than the maximum volume which the Government permitted Texaco Ecuador and Gulf Ecuador to produce. Defendants were not in any way compensated for this maneuver which was in

effect an increase in the percentage of CEPE's participation.

Moreover, CEPE was habitually late in meeting its 25 percent share of operating expenses and its payments for internal consumption crude.

In December 1975, the Government unilaterally set a presumptive production cost which was used to calculate Texaco Ecuador and Gulf Ecuador's income taxes. Actual costs were, in fact, higher than the "presumptive costs."

CEPE also began lifting crude oil which was not part of its 25 percent share, without compensating Texaco Ecuador and Gulf Ecuador for taking part of their share. The Government then demanded that the companies deliver an additional two million barrels to CEPE, without compensation, which it claimed was due to CEPE under "presumed" pro-

duction figures.

Defendants had attempted without success to discuss their problems with the Rodriguez Lara government and with the military junta which replaced it in January 1976. Under the military junta, Col. Rene Vargas Pazzos, General Manager of CEPE, was appointed Minister of Natural Resources and Energy. Texaco Ecuador and Gulf Ecuador regarded Minister Vargas as an ideologue with nationalist, anti-capitalist, and anti-oil company views.

From the outset, Minster Vargas declared to Gulf Ecuador that it had no right to question the actions of the Government. Vargas and his deputy, Carlos Jaramillo, threatened Gulf Ecuador with nationalization of its interests. Terence O'Brien, who was President and General Manager of Gulf Ecua-

dor, testified that the actions of the Government had brought about a de facto nationalization of Gulf Ecuador's rights without compensation. This continual erosion of Gulf Ecuador's position worsened in June 1976 with CEPE's lifting of crude which belonged to Texaco Ecuador and Gulf Ecuador Both companies protested. Gulf Ecuador went farther and in July 1976, it filed suit in the U.S. District Court in California against Atlantic Richfield, claiming that Atlantic Richfield, the refiner which had purchased the oil in question, had wrongfully converted Gulf Ecuador's property. Because of this litigation CEPE was not paid for this shipment of oil by the broker who had arranged for its purchase by Atlantic Richfield. This situation further eroded Gulf Ecuador's relations with CEPE and the

Ministry.

By mid-June 1976, Gulf Ecuador decided its only hope for relief was to place its incautation deposits in an interest bearing escrow account. Gulf Ecuador planned ultimately to turn these monies over to the Government when its problems were resolved. The amount of incautation deposits withheld was approximately equal to the overretainages of Gulf Ecuador's funds by the Government. In the event of the threatened nationalization, Gulf Ecuador felt that at least it would have saved the overretained taxes.

The reaction of the Minister, when he learned of the withheld incautation deposits, was to inform Gulf Ecuador that unless the withheld deposits were released by the end of August, Gulf Ecuador would be caduced.

Gulf Ecuador met with the military junta in mid-August to attempt to work out a compromise. The Junta added a new requirement, that Gulf Ecuador begin making incautation deposits not when it was paid for the crude, which was customary, but at an earlier point, when the crude was loaded for export. Gulf Ecuador did begin to make immediate incautation deposits for its liftings of crude but it held on to the escrowed deposits.

Gulf Ecuador, facing caducity, decided to attempt to negotiate a withdrawal from Ecuador. On August 31, 1970, O'Brien delivered a letter to the Junta, requesting such negotiations. The next day, the Government delivered a formal notice that Gulf Ecuador would be caduced unless it deposited all funds owed within 30 days. Gulf Ecuador asked

for help from the American Ambassador. With the intervention of the Ambassador, Gulf Ecuador obtained the agreement of the Government to reimburse it for the company's assets at net book value. An Inter-Institutional Commission was appointed to decide the terms on which Gulf Ecuador's interests would be terminated. At the third meeting of the Commission, Gulf Ecuador was informed that, whether or not an agreement had been reached, CEPE would begin lifting Gulf Ecuador's share of crude on January 1, 1977.

In the closing hours of 1976, the Government and Gulf Ecuador reached an agreement in principle by which CEPE acquired Gulf Ecuador's remaining 37.5 percent interest. The agreement provided for Gulf Ecuador to transfer its assets to the Government and for the

Government to pay for these assets at net book value, or unrecovered actual cost. The Agreement described the subject of the sale and the price as follows:

> 2.1 By the present agreement Gulf [Ecuador] transfers in perpetuity in favor of CEPE the totality of its rights in the assets that correspond to it in the present CEPE/TEXACO/GULF consortium and those that correspond to it in the Trans-Ecuadorian Pipeline. Accordingly, as of December 1976, at 06:00 hours the contract for exploration and exploitation of hydrocarbons entered into on 6 August 1973, authorized by Decree No. 925 of 4 August 1973, is extinguished as to Gulf [Ecuador] by reason of transfer.
>
> 2.2 For the transfer established in the preceding paragraph of this clause the Government of Ecuador via CEPE, shall pay to Gulf [Ecuador] the percentage that corresponds to it in the amount of the investments not amortized made in the performance of the contract of 6 August 1973 and those preceding, in accordance with justifying documents for the investments

> and the respective physical inventory and, also the cost of equipment, materials and supplies in stock and in transit....
>
> 2.3 To establish the values corresponding to the investments mentioned in the preceding number, the amounts for amortization and depreciation taken up to December 31, 1976 shall be deducted.

Clause 2.4 provided that an independent European auditing firm would be selected to establish the value of assets.

Gulf Ecuador insisted on a "quit-claim" as a term of the agreement. O'Brien testified that this was to make sure that Gulf Ecuador would not be required to face future claims that hadn't been addressed in the agreement. One such possibility was a demand, being talked about by leftist university students, that Gulf Ecuador pay for reser-

voir damage.[32] Clause 2.16 provided that "apart from the rights and obligations established in the present agreement, neither the Ecuadorian State nor CEPE owe anything to the Ecuadorian State or to CEPE."

The Government also then required a quitclaim, which appeared in Clause 2.13. According to Terence O'Brien, Clause 2.13 was supposed to protect the Government from contract payments which were owed by Gulf Ecuador but which had not yet been entered into Gulf Ecuador's books:

> 2.13 With respect to the obligations that Gulf [Ecuador] may have in favor of third parties and that do not appear in its accounting records, neither the Ecuadorian State nor CEPE assume any responsibility and must be taken care of by Gulf [Ecuador]. Therefore, CEPE only assumes obligations in accor-

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[32] T-1643.

dance with the present agreement.[33]

As of the end of 1976, with the execution of the agreement in principle, Gulf Ecuador terminated its interest in the Transfer Zone and stopped making payments to Norsul and Phoenix. CEPE did not assume responsibility for any part of these payments.

A formal agreement between the Government and Gulf Ecuador was finalized on May 27, 1977 (the "1977 Transfer Agreement"). The 1977 Transfer Agreement tracked the language of the agreement in principle which we have quoted

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[33]Plaintiff argues that the two percent payments do not appear in Gulf Ecuador's books since Gulf Ecuador could not deduct these payments as production costs for Ecuadorian tax purposes and that, therefore, liability for these payments remained with Gulf Ecuador. The fallacy of the argument that these payments did not appear in Gulf Ecuador's accounting books can be seen from the DHS audit, e.g., Impugnation 11.18.

above.

The 1977 Transfer Agreement contained an additional Clause Fourth which included a passage from a letter written by Terence O'Brien to the Minister of Finance: "[W]e clarify that ... Gulf [Ecuador] shall not transfer to CEPE its liabilities, including its debts to third parties." O'Brien testified that he wrote the letter at the urgent request of the Minister of Finance, that the Minister gave him no reason for the request and that he, O'Brien, was not referring in the letter to the two percent payments in any way.[34]

On September 14, 1978, the accounting firm of Deloitte, Haskins and Sells ("DHS") was selected to perform the audit to "determine the definitive value ... of the rights and shares of

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[34]T-1648-49.

[Gulf Ecuador] in the assets of the Consortium CEPE-Texaco-Gulf and in the Pipeline."[35]

DHS issued its final report on April 17, 1979. It concluded that the net book value or the unrecovered actual cost of Gulf Ecuador's remaining investment in producing assets and materials and supplies inventory in Ecuador, as of December 31, 1976, after deducting depreciation and amortization as of that date, was $74,792,625; that the cost of Gulf Ecuador's investment in the Pipeline, after deducting depreciation and amortization, was $42,020,000; and that the Government of Ecuador still owed Gulf Ecuador the sum of $1,208,478 from the 1974 transfer to CEPE.

After DHS had concluded its audit, but before it issued its final report,

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[35]DTX 314B.

the Ministry of Natural Resources sent to DHS "impugnations," questioning prior audit reports of Arthur Young & Company ("AY") and PMM. One of the impugnations concerned the two percent payments by Gulf Ecuador on production from the Transfer Zone. Since this item did not appear in the "State of Production Costs and Cost per Barrel Produced" of the AY final report, the Ministry believed it had been capitalized and included as investment. DHS concluded from its review of the joint Texaco Ecuador/Gulf Ecuador books and the entries relating to the two percent payments in those books that these payments were not capitalized in any of the accounts included in net investment. DHS determined that, because the two percent payments were net capitalized, they did not affect "net investment" upon which the price

that CEPE paid was based. The same challenge by the Ministry and resolution by DHS was made concerning the handling of the two percent payments in the PMM audit.

The Government of Ecuador made two payments to Gulf Ecuador of the balance owing for the acquisition of its interests, one payment on May 27, 1977, and the second on April 25, 1979. Gulf Ecuador paid no part of these monies to Phoenix or Norsul.

On the basis of the facts found above, and with the benefit of our observations of the various witnesses and our conclusions as to their credibility, the Court finds further that the Government of Ecuador, in acquiring the interests of Gulf Ecuador and Texaco Ecuador in the Transfer Zone, did not pay any amount for production rights or

lost future profits. In both the 1974 and the 1977 transfers, the Government intended only to pay Texaco Ecuador and Gulf Ecuador for the depreciated and amortized book value of their assets, plus the book value of their material and supplies inventory. It was contrary to the political philosophy of the Government of Ecuador in 1974 and in 1977 to pay for the oil reserves, which were the property of the State, the rights to exploit those reserves, or the future profits that might be earned from those reserves.

Furthermore, we find strong support for this conclusion in the fact that the price paid matched exactly the net book value of those assets acquired; that the acceleration of the acquisition of CEPE's 25 percent participation from 1977 to 1974 did not result in any pay-

ment to defendants for the loss of exploitation rights during those three years; and that defendants never received any compensation for the loss of profits and production rights from the Government of Ecuador in connection with other reductions in the size of the concession area or in the length of the exploitation period. We also note from the Impugnation to the DHS Audit that the hostility of the Ministry to the concept of paying for past two percent payments to Phoenix and Norsul, if those payments had been capitalized, reflects a similar hostility on the part of the Ministry to paying for future rights to such payments. In addition, there was never any study made by the parties, in connection with either the 1974 or the 1977 transfer, as to what was the value of petroleum reserves in the ground or

of profits that might be earned from them. Finally, the Sentencia, affirming Resolution 11927, declared the intent of the Government that any future expansion of CEPL's interests be reflected by a corresponding reduction in the calculation base for the two percent payments.

CONCLUSIONS OF LAW

I. UNJUST ENRICHMENT.

Because we have found as a matter of fact that Texaco Ecuador and Gulf Ecuador were not compensated for production rights or loss of profits resulting from the conveyance to CEPE of their interests in the Transfer Zone, we find as a matter of law that plaintiff cannot succeed in its claim based on unjust enrichment under Ecuadorian law. Defendants were not enriched because the payments they received were compensation only for the net book value of their

assets. The payments CEPE made to acquire its participation were not intended to and did not, in fact, compensate defendants for any future production rights or profits. Defendants were not enriched since they were compensated only for what CEPE obtained: their assets at net book value. Plaintiff suffered no loss because defendants did not receive or retain any benefit to which plaintiff was entitled. Failing to prove either of these two essential elements of an action de in rem verso, plaintiff cannot prevail in its claim for unjust enrichment.

We note moreover that, even if plaintiff had proved the elements of an action de in rem verso, still plaintiff has not proved damages. Plaintiff has acknowledged that part of the compensation received by Texaco Ecuador and Gulf

Ecuador was for assets or investment in Ecuador. However, plaintiff never designated at trial what portion of the compensation received by defendants, according to plaintiff's theories, was for defendants' investments and what portion was for loss of profits or production rights. Without this allocation, plaintiff fails to meet its burden of proof. For this reason, even if plaintiff had demonstrated the right to recover for unjust enrichment, it could not prevail here because it has failed to prove damages.

II. BREACH OF CONTRACT CLAIM.

Turning to plaintiff's breach of contract claim, the surviving part of that claim is that defendants Texaco Ecuador and Gulf Ecuador incorrectly calculated the two percent payments for three quarterly periods beginning on

October 1, 1973 and ending on June 2, 1974. Plaintiff contends that defendants improperly used the West Texas sour crude oil price instead of the higher Ecuadorian government tax reference price to calculate the payments for the disputed quarters. Defendants, on the other hand, contend the payments were correctly calculated because the 1961 Concession Contract specifically provided for the use of the West Texas sour crude oil price.

A. Basis for Calculation of the Two Percent Payments.

The 1961 Concession Contract between the Government of Ecuador and Minas incorporated Article 27 of the 1937 Hydrocarbons Law and established a formula for determining the price of oil for royalty payments to the government. Article 27 of the 1937 Hydrocarbons Law based the price of oil on the average

price in the world market. Article 26 of the 1961 Concession Contract stated:

> In accordance with letter A of Article 27 of the Petroleum Law, the parties agree that if the Government decides to collect in money, the royalty provided in clause 23rd of this contract, the value of the oil for this purpose, shall be periodically established by agreement between the Government and the concessionaire, thus: the average value of the oil in the world market, in the preceding quarter (this value represented by letter X), shall be determined applying the following formula: X=A-B.
>
> A. - Letter A shall represent the price posted or declared in an oil field of substantial production in the state of Texas ... for crude oil ... plus the pipeline tariff established for the transportation of such crude oil from the producing field to the nearest export point.
>
> B. - Letter B shall represent the cost of transportation of the crude oil price from Guayaquil to the port of New York. (Emphasis added).

A part of the 1961 Concession grant to Minas was transferred to the defendants pursuant to the 1965 Contract. Clause 6 of the 1965 Contract requires that defendants pay to the transferor "an amount which represents the value ... of 2% of the net production" of all crude oil and natural gas produced in the Transfer Zone. Clause 6(b) states that the value of the crude oil:

> [S]hall be understood as the value defined in each case for the purpose of the calculating the payment of the royalties which cessionaires must make to the Government.

Clause 8 of the 1965 Contract further provides that it is the intention of the parties to calculate the two percent payments on the "same bases established for the respective payments to the Government according to the contract." The 1965 Contract defines such

a reference to "the contract" as being to the 1961 Concession Contract.

Thus, the 1965 Contract made it clear that the two percent payments were to be calculated in the same manner as royalty payments to the Government would be computed under the 1961 Contract. The 1937 Law, which controlled these payments to the Government under the 1961 contract, specified that the price of oil would be based on the market price. The language of the 1937 Hydrocarbons Law together with the statement in the 1961 Contract that the desired price will be "the average value of the oil in the world market," gave an indication that the parties to the 1961 Contract intended to use the West Texas

sour crude oil price only as a marker to arrive at the actual market price.[36]

In 1971 a new Hydrocarbons Law was enacted to replace the 1937 law. Article 65 of the new law replaced the government royalty valuation provisions of Article 27 of the 1937 law. Article 65 provided that:

> Royalties in cash, income tax, Government's participation and generally any assessments depending on the sale price of hydrocarbons in the foreign market, shall be regulated by the reference prices of petroleum. (Emphasis added).

Article 65 also stated that, although these reference prices might be discussed with the producers, the price would be unilaterally set by the government.

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[36]The West Texas price was reflective of world market price at the time of the 1961 Contract.

No oil was produced in the Transfer Zone until 1972. Therefore, the 1937 method of valuation was never applied to set Government royalty payments on petroleum produced there; nor were the two percent payments ever calculated prior to the enactment of the 1971 Law.

Defendants contend that the effects of the 1971 Law so frustrated the purpose of the 1965 Contract that the defendants were not obligated to make the two percent payments based on the new tax reference price. They urge that a tax reference price, unilaterally established by the Government of Ecuador, cannot be used to replace the former bilaterally set royalty price, based on the West Texas sour crude marker.

When the new tax reference price went into effect, defendants decided that a new agreement was necessary.

Norsul and Phoenix reluctantly agreed to enter into an Interim Agreement which established a new price valuation method. This agreement specifically provided that the parties were not waiving any rights under the 1965 Contract. The Interim Agreement covered the period from the commencement of production in the Transfer Zone in 1972 until March 31, 1973. Defendants made payments to Phoenix and Norsul in accordance with this agreement, not only through the first quarter of 1973 when, by its own terms, the agreement was terminated, but for the second and third quarters of 1973 as well. The Interim Agreement was voluntarily followed until war in the Middle East broke out in October 1973 and world oil prices and the Ecuadorian reference price skyrocketed. At the same time, the U.S. government imposed

federal price controls on the West Texas sour crude oil, creating a drastic difference in price between the West Texas and world market prices.

This turn of events naturally made the West Texas price much more desirable as a marker to defendants than the tax reference price set by the government. Defendants subsequently paid Phoenix its portion of the two percent for the last quarter of 1973 and the first two quarters of 1974 calculated on the basis of the West Texas price.

It is not surprising that defendants began searching for an alternative when the price of oil and their obligations for the government royalty, and consequently to Phoenix and Norsul, climbed so radically in such a short period of time. However, this does not permit defendants to disregard the lan-

guage of the 1965 Contract and the effects on it of the 1971 Law. The 1965 Contract adopts the Government royalty, as determined under the 1961 Contract. Once the 1971 Law was promulgated, calculation of government royalties under the 1961 Concession Contract was based no longer on Article 26 of the 1961 Contract, but on Article 65 of the 1971 Law. Defendants, pursuant to the 1965 Contract, paid their government royalty on oil, produced in the Transfer Zone, on the basis of the 1971 Law. It only follows that the two percent payments, based on the two percent of the royalty paid to the Government, should in the same way be computed on the basis of the royalty actually paid, not the royalty as it would have been calculated under an enactment which was no longer in effect. For this reason, the Court now

concludes that it is the official government tax reference price, and not the West Texas sour crude or any other privately negotiated price, which should be used by Texaco Ecuador and Gulf Ecuador under the 1965 Contract, to calculate the two percent payments for the disputed quarters.

Defendants argue, however, that the propriety of their use of the West Texas price is confirmed by Resolution 11927, which was drawn up to settle the disagreements over the assessment of the two percent payments. Resolution 11927 provided that the tax reference price was to be used to calculate the two percent payments from June 3, 1974, and that the 86 percent tax on the payments would be recalculated retroactively, using the 1971 Law tax reference price. The relevant provisions of the resolu-

tion stated:

> Art. 10 - The Central Bank of Ecuador, with the participation of the representatives of the General Hydrocarbons Office and the National Development Bank will proceed to audit the assessments of the payment of the two percent made prior to issuing the present Regulation and shall carry out reassessments corresponding to the 86 percent of the National Development Bank.
>
> Art. 11 - Provisions of the present Regulation, insofar as they refer to the 14% of the successors in rights of the grantees, shall be applied from the present date without prejudice to publication in the Official Registry. (Emphasis added).

This language indicates that Resolution 11927 did not address the issue of the 14 percent payments made prior to June 3, 1974, the date the resolution was issued. Minister Jarrin testified in his deposition that the fundamental purpose of the resolution was to ensure that the Development Bank

was paid the correct amount of taxes on the two percent. The Development Bank needed a "clear basis" to establish the payment of the 86 percent tax. However, the private dispute over the computation of the 14 percent did not concern the Minister prior to the promulgation of 11927. Prospective calculation of the 14 percent was, on the other hand, of interest to the Government because 11927 created an obligation on the part of Norsul and Phoenix to invest one-half of their 14 percent in national development programs in Ecuador.[37] Dr. Luiz Arauz, Minister Jarrin's legal adviser, also testified at his deposition that the Government was not interested in how payment had been agreed to between private parties:

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[37]Jarrin D-92-94.

> [T]his was a private contract and we could not interfere...
>
> This was something that had already been consummated, it was paid, and how much was paid, and how it was paid, I think we, as the Government, we would not have interfered in these very strictly private matters.[38]

Since Resolution 11927 did not effect the rights of the parties regarding the after tax 14 percent of the two percent until June 3, 1974, the payments for the previous quarters are controlled strictly by the contractual relationship between the parties. This contract incorporated the price of West Texas sour crude as an example, not as a requirement. As we point out above, the language of the 1965 Contract requires the two percent payment to be calculated on the basis of the royalty paid to the

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[38]Arauz D-182-183.

Government, which, after the enactment of the 1971 Law, was the tax reference price.

Moreover, the fact that the Government of Ecuador refused to recompute the 14 percent for the periods prior to June 3, 1974, does not mean it adopted defendants' method of computation. It is more reasonable to conclude that this hands off attitude merely reflects the reluctance of the Government to get involved in that portion of the dispute in which it had no direct interest.

B. Volume and Exchange Deductions.

Plaintiff's contention that Texaco Ecuador and Gulf Ecuador have applied certain deductions to the volume base of the two percent payments which were not permitted by the 1965 Contract also has merit. Defendants deducted a 10 percent increase in the government royalty and a

two percent currency exchange charge from the amount paid to plaintiff for the three disputed quarters.

The 10 percent volume reduction was imposed by defendants in order to offset the increase in government royalty from six percent at the time of the 1965 Contract to 16 percent in late 1973. This reduction was not authorized anywhere in the 1965 Contract, but defendants claim it is justified by "force majeure." "Force majeure" is defined in the Civil Code of Ecuador as an "act of God, the unforseen which is not possible to avoid, such as a shipwreck, an earthquake, an imprisonment by enemies, acts of authority carried out by a public functionary, etc." Code Civil art. 30 (Ec.). The burden of proving an act of God is on the party who alleges it. Code Civil art. 1590 (Ec.).

The defendants have not met this burden as there has been very little if any showing that the 6 percent to 16 percent increase was unforeseen or impossible to avoid. It is true that there is ample evidence in the record of the drastic effect that the changing political climate had on the oil industry in Ecuador. However, there was no evidence that this specific 10 percent increase over a seven year period should not have been anticipated. An increase from the six percent specified in the 1961 Concession Contract could not have been completely unexpected in 1965 when other countries in the world where Texaco and Gulf were operating had higher royalties. Moreover, it was certainly possible to avoid the consequences of such an increase by providing for it in the contract.

Texaco Ecuador and Gulf Ecuador claim the same "force majeure" defense with regard to the two percent currency exchange charge. Defendants have again failed to meet their burden of proof as the possibility of a currency exchange charge can hardly be considered unforeseeable in this type of transaction.

D. Contract Damages.

We have found that defendants Texaco Ecuador and Gulf Ecuador have breached their contract with plaintiff by incorrectly calculating the two percent payments for the three disputed quarters. The parties have stipulated that the amounts paid to plaintiff for those three quarters are as follows:

4th Quarter 1973	$ 45,962
1st Quarter 1974	$ 49,157
2nd Quarter 1974	$109,047
T O T A L	$204,166

The parties have also stipulated that, if the 14 percent payments were based on the tax reference price and the additional 10 percent and two percent deductions were not taken out, the plaintiff would be entitled to contract damages in the amount of $365,479. We find that plaintiff is entitled to recover this amount.

Finally, plaintiff for the first time in its post-trial briefing asserts a claim for consequential damages, including attorneys' fees, based on alleged bad faith by defendants' in their breaching of the 1965 Contract. This claim was not included in the Pre-Trial Order and we will not permit it to be raised now in this untimely manner.

III. PREJUDGMENT INTEREST.

Phoenix contends it is entitled to prejudgment interest for the breach of

contract claims from the date this action was commenced on November 26, 1976. A letter opinion by plaintiff's Ecuadorian law expert, Dr. René Bustamante, serves as the basis for Phoenix's assertions that Ecuadorian law entitles them to prejudgment interest. No other evidence of Ecuadorian law was offered by Phoenix, but the text of Monetary Board Regulation 755 and several sections of the Civil Code submitted by defendant help to clarify some of the statements made in Dr. Bustamante's letter.[39] Defendants also submitted the affidavit of their Ecuadorian expert, Dr. Miguel Andrade Varea, to counter the assertions of Dr. Bustamante.

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[39]These submissions by the defendant included: Articles 7 and 1611 of the Civil Code of Ecuador, Monetary Board Resolution 755, and Articles 25 and 28 of the Tax Code of Ecuador.

The initial question of whether prejudgment interest is appropriate for defendant's breach of contract claim does not appear to be in dispute. Defendant's main contention, through its briefing and the Andrade affidavit, is that prejudgment interest is not permitted for the claim of unjust enrichment because the amount of the claim is not fixed until a judgment has been rendered by the court. Dr. Bustamante's letter does not address this issue of whether a definite or sum certain is required with respect to either the breach of contract or the unjust enrichment claims. However, defendant's expert does not contend that the amount due under the breach of contract claims are too uncertain under Ecuadorian law to be subject to prejudgment interest. Dr. Andrade simply concludes that "[p]re-

judgment interest in Ecuador is unavailable on the plaintiff's claim for unjust enrichment." Therefore, this Court can only conclude that, to the extent certainty in the amount due is required under Ecuadorian law, that requirement has been satisfied with respect to plaintiff's breach of contract claim, and prejudgment interest is applicable.

Having determined that defendants are liable for prejudgment interest, we must decide at what date the interest begins to accrue and what rate of interest to apply. The dispute over the date at which interest begins to accrue centers on whether the date of filing the complaint or the date of service of the complaint is controlling. The complaint was filed on November 26, 1976 and served on Gulf Ecuador on December 1,

1976 and on Texaco Ecuador on December 3, 1976.[40]

Defendant's expert, Dr. Andrade, states in his affidavit that if prejudgment interest were to be assessed it would begin to accrue only from the dates the complaint was served on the defendants. Andrade does not refer specifically to the basis for his conclusion. However, it is consistent with the principle that prejudgment interest cannot attach until the debtor is made aware of a definite sum which is due. Plaintiff disputes Dr. Andrade's conclusion but offers no support for its position. Dr. Bustamante's letter does not make any reference at all to a date when prejudgment interest should accrue, nor

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[40]Although the length of time between the dates is not great, the controlling date must be determined in order to properly measure the amount of prejudgment interest due.

does he refer to whether the claim must be certain before prejudgment interest can attach. Since there is no evidence in the record to oppose defendant's position, we find that prejudgment interest shall accrue from the date of service.

The parties have not contractually stipulated to any particular rate of interest or formula to compute the interest. Where the rate has not been stipulated by the parties, both experts agree that the legal rate of interest applies. The legal rate of interest in effect in Ecuador at the time the complaint was filed and served was eight percent per annum. Monetary Board Resolution 755, January 16, 1975. Defendants contend that this eight percent interest rate should be applied from the date of accrual to the present. Plain-

tiff, on the other hand, argues that the legal rate of interest increased five different times since Regulation 755 went into effect in 1975, and that the rate of prejudgment interest should increase as well during those periods. The last change went into effect on December 20, 1984 and increased the legal interest rate to 23 percent.[41] There-

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[41]Increases in the legal interest rate in Ecuador as set forth by Dr. Bustamante in his letter opinion of June 11, 1985, were as follows:

1975 Regulation 755,
January, 25, 1975, 8%
1982 Regulation 1170,
January 11, 1982, 15%
1983 Regulation 061,
March 19, 1983, 16%
1983 Regulation 125,
October 27, 1983, 19%
1984 Regulation 175,
June 26, 1984, 21%
1984 Regulation 214,
December 20, 1984, 23%

Plaintiff has represented to the Court that no changes in the interest rate have been made since December 20, 1984.

fore, the difference in rates asserted by plaintiff and defendant is dramatic.

Dr. Bustamante's letter consists of a somewhat detailed analysis of the rates of interest in the Ecuadorian legal system. Dr. Andrade simply makes a conclusory statement that the rate of interest is to be calculated at a rate of 8 percent from the time the complaint was served. However, Dr. Andrade cites and includes as exhibits to his affidavit Article 7 of the Civil Code and a judicial opinion of the Supreme Court of Justice of Ecuador. Segoria v. Acosta, Judgment No. 341, Third Chamber, November 11, 1977. Article 7 of the Civil Code establishes the general principle that a new law shall prevail over a previous law where provisions in the two laws conflict. This provision obviously favors plaintiff's position that the

rate of interest should increase with the legal rate.

In the Segoria case, a legal rate of 6 percent, the rate in effect at the time the complaint in Segoria was served, was applied for the entire period even though Resolution 755 changed the rate to 8 percent two years before the decision was rendered by the Court. The Court based its decision upon language in Article 8 of Regulation 755 which states that the provisions of the "Regulation shall apply only to the acts and contracts entered into from and including the date it is published in the Registro Oficial." Segoria at 11; Regulation 755, Article 8. However, there are two problems with this analysis which cast doubt on defendants' position. First, judicial decisions are not binding precedent in a civil law juris-

diction such as Ecuador. Phoenix III at 10 n.11. Second, the language of Regulation 755, which is quoted above and cited in Segoria, is immediately followed by language which states, "[t]herefore, the types of interest rates stipulated in the acts and contracts entered into prior to that date ... shall continue in effect until the expiration date agreed upon in the respective acts or contracts." Regulation 755 (emphasis added). This language indicates that the new interest rate will not apply to any existing contracts which had already stipulated the interest rate. However, in situations where no interest rate has been agreed upon by the parties, the current legal rate of interest should be held to apply.

For this reason, we find that the rate of prejudgment interest shall begin at 8 percent per annum and increase in accordance with increases in the Ecuadorian legal rate of interest.

IV. LIABILITY OF PARENT CORPORATION.

Phoenix asks the Court to find liability not only on the part of the subsidiaries, Texaco Ecuador and Gulf Ecuador, but on the part of the parent corporations, Texaco and Gulf. Since we have ruled that the subsidiaries did breach the 1965 Contract in their calculation of the two percent payments for the disputed quarters, we must now examine this claim against the parent corporations. Plaintiff advances the theory that liability rests with the parents because the subsidiaries were acting purely as agents of the parent corporations in all matters relevant to

this cause of action.

Both parties agree that Delaware law should apply to this question.[42] There are essentially two general theories of liability under which a parent corporation may be held responsible for the obligations of its subsidiaries. Some courts, using the phrases "pierce the corporate veil", "alter ego" or "instrumentality", have imposed liability on the parent corporation only when there is a showing of

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[42]Judge Schwartz in Phoenix II has already held that Ecuadorian law should apply to the substantive issues in this case. However, Judge Schwartz did not address the issue of whether Gulf and Texaco may be held liable for the obligations of their subsidiaries. Because the subsidiaries here are Delaware corporations, and one of the parent corporations, Texaco, is a Delaware corporation, it is appropriate that Delaware law be applied in deciding this issue of parent corporation liability for the activities of its subsidiary. Japan Petroleum Co. (Nigeria) Ltd. v. Ashland Oil, 456 F.Supp. 831, 840 (D.Del. 1978).

fraud or inequity. See Sears Roebuck and Co. v. Jardel Co., 421 F.2d 1048, 1053 (3rd Cir. 1970); Pauley Petroleum Inc. v. Continental Oil Co., 239 A.2d 629, 634 (Del. 1968); Skouras v. Admiralty Enterprises, Inc., 386 A.2d 674, 681 (Del. Ch. 1978). Other courts have based liability of the parent on the principles of agency, without reference to fraud or inequity. See Japan Petroleum Co. (Nigeria) Ltd. v. Ashland Oil, Inc., 456 F.Supp. 831, 839-840 (D.Del. 1978).

Phoenix bases its claim of parent liability on the agency theory only. Under the agency theory, the issue of liability rests on the amount of control the parent corporation exercises over the actions of the subsidiary. The parent corporation will be held liable for the activities of the subsidiary

only if the parent dominates those activities. Id. at 841. Factors to consider in determining whether "domination" exists include "stock ownership, officers and directors, financing, responsibility for day-to-day operations, arrangements for payment of salaries and expenses, and origin of subsidiary's business and assets." Id.; Fish v. East, 144 F.2d 177, 191 (10th Cir. 1940).

Both Gulf Ecuador and Texaco Ecuador were wholly owned subsidiaries of their parent corporations. This alone does not make a subsidiary the agent of its parent. Scott-Douglas Corp. v. Greyhound Corp., 304 A.2d 309, 314 (Del. Super. 1973). The boards of directors of Gulf Ecuador and Texaco Ecuador were separate from those of the parent corporations although there were officers

and directors common to the boards of both parent and subsidiary. Again, this similarity by itself does not indicate an agency relationship. Japan Petroleum, 456 F.Supp. at 841. The parent corporations were also in the substantial financial decisions of the subsidiaries. According to Robert Shields[43], Texaco Ecuador needed the approval of Texaco to get money for very large investments and for the acquisition or sale of major assets.[44] Gulf Ecuador also sought approval form its parent on policy matters and major financial matters.[45]

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[43]Robert Shields was Chairman of the Board and Chief Executive Officer of Texaco Ecuador and Vice President in charge of production in Latin America at Texaco, Inc.

[44]T-1256.

[45]T-1575.

On the other hand, each subsidiary kept books and records completely separate from the parent corporation; each maintained its own bank accounts and paid its own taxes. The subsidiaries, although Delaware corporations, had their principal places of business in Ecuador and were completely responsible for their day to day operations in that country. This included drilling oil wells, building the pipeline, and participation in the management of these projects. The 1973 Exploitation Contract, the June 14, 1974 Acta and the 1977 Transfer Agreement were all executed by Texaco Ecuador and Gulf Ecuador.

In a case decided in this Court, Japan Petroleum, 456 F.Supp. 831, a Nigerian corporation sued a Kentucky corporation and two of its wholly owned subsidiaries for breach of contract.

The Court noted that no agency relationship existed between the subsidiary and parent in spite of substantial evidence of joint operations. The Court found that the parent was very active administratively and monetarily in getting the operations of the subsidiary started, most of the officers and directors were the same, the parent provided consulting services to the subsidiary, all expenditures over $250,000 had to be approved by the parent, the parent paid the salaries of all non-Nigerian employees of the subsidiary, the parent guaranteed three major bank loans of the subsidiary and the annual report of the parent reported that the operations of the subsidiary were actually the operations of the parent. Id. at 842, 843.

In spite of all these factors, the Court determined there was sufficient

indicia of separate corporate ownership to keep the subsidiary from being considered the agent of the parent. For example, the subsidiary was an operating corporation with obligations and rights of its own in Nigeria, the Nigerian government exercised extensive control over the operations of the subsidiary, the subsidiary had its own bank accounts and a substantial book value, the bank loans had been repaid by the subsidiary, the subsidiary had its own offices in Nigeria, hired its own employees and debited its account for any salaries paid by the parent. In essence, "the overall picture ... is not one of complete domination or control." Id. at 844-845.

In light of the facts in Japan Petroleum, it can hardly be said that the facts presented to the court in this

case show complete domination or control by Texaco and Gulf over their subsidiaries. Gulf Ecuador and Texaco Ecuador, not the parent corporations, were authorized to exploit the oil reserves in the Transfer Zone and carried out the day to day activities, required to accomplish this. The facts of this case seem to indicate even less control by the parent corporations than was exercised by the parent in the Japan Petroleum case. Therefore, we conclude that Texaco and Gulf shall not be held liable for the activities of their subsidiaries.

CONCLUSION

For the reasons stated above, judgment is granted in favor of defendants on the claim of unjust enrichment. On the claim of breach of contract, based on the miscalculation of the two percent

payments for the three quarters at issue, judgment is granted in favor of plaintiff against Gulf Ecuador and Texaco Ecuador but not against the parent corporations. Plaintiff shall submit an Order, awarding damages of $365,479 against Gulf Ecuador and Texaco Ecuador, with interest to be computed as set out above.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

PHOENIX CANADA OIL COMPANY LIMITED, Plaintiff, v. TEXACO, INC., TEXACO PETROLEUM COMPANY and ECUADORIAN GULF OIL COMPANY, and GULF OIL CORPORATION (now, by change of name, CHEVRON U.S.A. INC.), Defendants.	)	Civil Action No. 76-421-JRR MEMORANDUM OPINION

Wilmington, Delaware
April 28, 1987

ROTH, District Judge

This is a diversity action brought by plaintiff, Phoenix Canada Oil Company Ltd. ("Phoenix"), claiming breach of contract, unjust enrichment and intentional infliction of economic distress by defendants, Texaco, Inc. ("Texaco"), Gulf Oil Corporation, now by a change of name Chevron U.S.A., Inc. ("Gulf"), Texaco Petroleum Company ("Texaco Ecuador"), a Delaware corporate sub-

sidiary of Texaco, and Ecuadorian Gulf Oil Company ("Gulf Ecuador"), a Delaware corporate subsidiary of Gulf. Plaintiff's claims arose from a dispute over the assignment of rights to Texaco Ecuador and Gulf Ecuador to explore for and exploit petroleum reserves in a concession area in eastern Ecuador. The assignment was made pursuant to an agreement referred to as the "1965 Contract".

The long and complicated history of this case is recited in the Court's Opinion of March 13, 1987,[1] as well as in several of the earlier opinions, and will not be repeated here. In the March 13, 1987 opinion we held that defendants Texaco Ecuador and Gulf Ecuador, but not the parent corporations, were liable to

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[1] Phoenix Canada Oil Company, Ltd. v. Texaco, Inc., No. 76-421 (D.Del. March 13, 1987) ("Phoenix IV").

the plaintiff on the breach of contract claim, arising from miscalculation of the two percent payments owed to plaintiff. We ruled in favor of defendants on the unjust enrichment and intentional infliction of economic distress claims. In connection with the breach of contract claim, we held that prejudgment interest would apply to the parties' stipulated amount of damages for that claim and instructed plaintiff to submit an Order awarding damages of $365,479 against Texaco Ecuador and Gulf Ecuador, plus the prejudgment interest as computed in accordance with the opinion.

At this late date of the proceedings, a dispute has now arisen between the parties as to whether this order should reflect joint and several liability of defendants or liability should be separate.

Defendants contend for the first time in this prolonged litigation,[2] after trial and after we have issued an opinion holding the defendant subsidiaries liable, that the judgment against Texaco Ecuador and Gulf Ecuador should be separate rather than joint and several. In support of their position, defendants submitted the affidavit of Michael A. Schwind, one of defendants' experts on Ecuadorian Law. Professor Schwind opines that under the law of Ecuador, the obligation of Texaco Ecuador and Gulf Ecuador are divisible; and, thus, each defendant is obligated to pay

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[2]This action was filed over ten years ago in 1976. In addition to Phoenix IV, the litigation has produced three prior opinions: Phoenix Canada Oil Co., Ltd. v. Texaco, Inc., 78 F.R.D. 445 (D.Del. 1978) ("Phoenix I"); Phoenix Canada Oil Co., Ltd. v. Texaco, Inc., 560 F.Supp. 1372 (D.Del. 1983); ("Phoenix II"); Phoenix Canada Oil Co., Ltd. v. Texaco, Inc., No. 76-421 (D.Del. July 20, 1984) ("Phoenix III").

only its respective share of the obligation.[3]

Plaintiff has submitted no evidence as to the law of Ecuador on this issue. Rather they contend that defendants never questioned plaintiff's assertions of joint and several liability at any point during the litigation, and that it is too late to raise the issue at this stage.

The parties have submitted written letter memoranda to the Court, and a teleconference was held on April 21, 1987 to discuss the issue. Having reviewed all of the relevant information, we agree with plaintiff's position and

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[3]The parties seem to agree and the history of this litigation indicates that Texaco Ecuador and Gulf Ecuador each had an equal 50 percent interest in the concession area. Therefore, if the obligation was divisible, each defendant would be responsible for 50 percent of the judgment obligation.

hold that defendants shall be joint and severally liable for damages on the breach of contract claim.

Discussion.

In Phoenix II Judge Schwartz held that Ecuadorian law applied to plaintiff's breach of contract claim. He based his decision on Delaware's choice of law provisions finding that under either the traditional or "most significant relationship" test, Ecuadorian law was applicable. See Phoenix II, 560 F.Supp. at 1379. This decision eventually led defendants to move for a determination of Ecuadorian law under Fed.R.Civ.P. 44.1[4]. The parties were

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[4]Fed.R.Civ.P. 44.1 provides:

> A party who intends to raise an issue concerning the law of a foreign country shall give notice in his pleadings or other reasonable written notice. The court, in determining foreign law, may consi-

(continued...)

given every opportunity to submit evidence and argue their positions on the law of Ecuador. However, at no time did defendants contest plaintiff's assertion of joint and several liability[5] or offer any evidence of Ecuadorian law on the issue.

After defendants had moved for summary judgment, Judge Schwartz held in Phoenix III that plaintiff's breach of contract claim for the miscalculated payments had no merit. However, Judge Schwartz later became aware of informa-

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[4](...continued)
der any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law.

[5]Plaintiff first claimed defendants were jointly and severally liable in their complaint filed November 26, 1976, in the Prayer For Relief.

tion from newly produced documents which caused him to vacate that part of his ruling on June 11, 1985 and to permit plaintiff to go to trial on both the breach of contract and unjust enrichment claims.[6] Trial was held in September 1986 and resulted in our opinion of March 1987.

Both the breach of contract and unjust enrichment claims were dealt with extensively in the pretrial order, at trial, and in the parties' Proposed Findings of Fact and Conclusions of Law submitted to the Court after trial. Plaintiff claimed both in the complaint and in the post-trial Proposed Conclusions of Law[7] that they were entitled to

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[6]See Phoenix Canada Oil Co. Ltd. v. Texaco, Inc., No. 76-421 (D.Del. June 11, 1985) (order vacating Section 5 of Phoenix III).

[7]See Plaintiff's Proposed Conclusions of Law at 183, Conclusion No. 63.

a judgment jointly and severally against defendants. At no time before the final decision was rendered did defendants dispute this contention or put the Court or the plaintiff on notice of their current assertion that Ecuadorian law mandated separate rather than joint and several liability.

Rule 44.1 states that "[a] party who intends to raise an issue concerning the law of a foreign country shall give notice in his pleadings or other reasonable written notice." There has certainly been ample notice of the applicability of Ecuadorian law to the breach of contract claim in general. Moreover, Judge Schwartz specifically held that Ecuadorian law applied to the breach of contract claim.

However, where defendants never disputed plaintiff's claim of joint and

several liability, never contended that Ecuadorian law applied to this specific issue and never offered any evidence of Ecuadorian law on this point, we do not believe that defendants' assertion after trial and after an adverse decision on the merits can be viewed as "reasonable" under Rule 44.1.

The Advisory Committee's notes to Rule 44.1 offer some guidance on the timing of the notice on foreign law:

> The new rule does not attempt to set any definite limit on the party's time for giving notice of an issue of foreign law; in some cases the issue may not become apparent until the trial and notice then given may still be reasonable. The stage which the case had reached at the time of the notice, the reason proffered by the party for his failure to give earlier notice, and the importance to the case as a whole of the issue of foreign law sought to be raised, are among the factors which the Court should consider in deciding the reasonableness of a notice.

Defendants contend that there was never any reason to address this issue before, assumedly because there was no judgment against defendants. However, continuing with this rationale, there would have been no reason to address the issues of prejudgment interest or parent liability either. Both questions were fully briefed in the parties post-trial briefs and dealt with in their Proposed Findings of Fact and Conclusions of Law. With respect to prejudgment interest, both parties submitted affidavits or opinions of their Ecuadorian law experts which were relied on by the Court in making its decision on this issue.

Neither of these two issues became relevant until the Court ruled in plaintiff's favor on the breach of contract claim. In spite of this, defendant's made their positions clear

well in advance of the Court's decision. There can be no valid reason for addressing these issues yet ignoring the question of joint and several liability.

Furthermore, the importance of this particular question of foreign law pales in comparison to the importance of the substantive issues in the case. To force the plaintiff to hire another Ecuadorian Law expert at this stage of the litigation when defendants have long been on notice of plaintiff's position on this issue, will prolong this litigation even further and cause undue prejudice to the plaintiff.

When there has been no notice of intent to rely on foreign law on a particular issue, we are not obligated to apply the foreign law. Commercial Ins. Co. of Newark, N.J. v. Pacific-Peru Constr. Co., 558 F.2d 948, 952 (9th Cir.

1977). Even where the appropriate notice has been filed, we shall assume the foreign law is the same as that of the forum state if the parties have failed to brief or produce any evidence of the foreign law. Vishipco Line v. Chase Manhattan Bank, N.A., 660 F.2d 854, 860 (2d Cir. 1981); Bowman v. Grolsche Bierbrouwerij B.V., 474 F.Supp. 725 (D.Conn. 1979).

Therefore, even assuming Judge Schwartz' ruling on Phoenix II mandated the application of Ecuadorian law to this specific issue of joint and several liability, defendants failure to offer any evidence of Ecuadorian law prior to the Court's final decision leads us to assume that Ecuadorian law is the same as the law of Delaware.

In Delaware there is a presumption of joint and several liability where

more than one party is obligated under one contract. See 6 Del.C. §2701; Lamson v. Habbart, 42 Del. 600, 43 A.2d 249 (1945). Section 2701 states that "[a]n obligation or written contract of several persons shall be joint and several, unless otherwise expressed."

The 1965 contract which created defendants' obligations nowhere expresses that the obligations are divisible. In fact, what little reference to this issue there is in the 1965 Contract seems to indicate joint and several liability rather than separate.[8] Therefore, we find that defendants Texaco Ecuador and Gulf Ecuador are jointly and severally liable to plaintiff for the breach of contract damages as set forth in the Court's

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[8]See 1965 Contract, clause 15 (Defendants' Trial Exhibit 12A & B).

opinion of March 13, 1987. The Order plaintiff has been instructed to submit shall reflect our ruling in this Opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

PHOENIX CANADA OIL COMPANY LIMITED, Plaintiff,	)	Civil Action No. 76-421-JRR
v.	)	
TEXACO, INC., TEXACO PETROLEUM COMPANY and ECUADORIAN GULF OIL COMPANY, and GULF OIL CORPORATION (now, by change of name, CHEVRON U.S.A. INC.), Defendants.	)	

ORDER GRANTING FINAL JUDGMENT

This action came on for trial before the Court, the Honorable Jane R. Roth, District Judge, presiding, and the issues of unjust enrichment and certain breaches of contract having been duly tried without a jury, and a decision having been rendered,

NOW, upon the Opinion of the Court dated March 13, 1987, as corrected by the Order of March 16, 1987, the Memorandum Opinion of April 28, 1987, and

all prior proceedings, decisions, orders and papers filed herein;

IT IS ORDERED THAT:

1. Judgment is granted in favor of plaintiff and against defendants Texaco Petroleum Company and Ecuadorian Gulf Oil Company, jointly and severally, for damages for breach of contract in the amount of $365,479.00, plus pre-judgment interest of $532,608.71, amounting in all to $898,087.71;

2. Judgment is granted in favor of defendants Texaco Petroleum Company and Ecuadorian Gulf Oil Company and against plaintiff that plaintiff take nothing on all other claims, and all other claims against such defendants are dismissed with prejudice;

3. Judgment is granted in favor of defendant Gulf Oil Corporation (now, by change of name, Chevron U.S.A. Inc.)

and against plaintiff that plaintiff take nothing on all claims, and all claims against that defendant are dismissed with prejudice;

4. Texaco Inc. having filed a petition under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York on April 12, 1987, entry of judgment in favor of defendant Texaco Inc. that plaintiff take nothing on all claims, and all claims against it be dismissed with prejudice is stayed pursuant to the provisions of 11 U.S.C. §362; and

5. It is expressly determined by the Court that there is no just reason to delay the entry of judgment in accordance with this Order until final judgment is entered in favor of Texaco Inc.

6. The Clerk shall forthwith docket and enter judgment in accordance herewith.

/s/ Jane R. Roth
United States District
Judge

Dated: May 4, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

PHOENIX CANADA OIL COMPANY LIMITED, Plaintiff,	)	Civil Action No. 76-421 MMS
v.	)	
TEXACO, INC., GULF OIL CORPORATION, TEXACO PETROLEUM CO. & ECUADORIAN GULF OIL CO., Defendants.	)	MEMORANDUM OPINION

Joseph A. Rosenthal, Esq., Morris & Rosenthal, Wilmington, Delaware; Of Counsel: Edward Nathan, Esq., New York, New York; attorneys for plaintiff.

William O. LaMotte, Esq., Morris, Nichols, Arsht & Tunnell, Wilmington, Delaware; Of Counsel: Milton J. Schubin, Esq., and Milton Sherman, Esq., Kaye, Scholer, Fierman, Hays & Handler, New York, New York; attorneys for defendants.

Wilmington, Delaware
July 20, 1984

SCHWARTZ, District Judge

Defendants have moved for a determination of Ecuadorian law under Fed. R.

Civ. P. 44.1.[1] The determinations they advance, if accepted, would entitle them to summary judgment in their favor. Thus, for all practical purposes, defendants' motion is equivalent to one for summary judgment.[2]

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[1]Fed. R. Civ. P. 44.1 provides:

> A party who intends to raise an issue concerning the law of a foreign country shall give notice in his pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law.

[2]Defense counsel admitted as much at oral argument. See Docket Item ("Dkt.") 191 at 9, 30.

I. Background

In two prior published opinions,[3] as well as an earlier unpublished forty-five page Magistrate's Report and Recommendation,[4] the factual background of this dispute has been recited. Those facts will not be rehearsed again. It will suffice to explain that plaintiff, which had a 1% royalty right in oil produced by defendants in the so-called "Transfer Zone" in Ecuador, complains about defendants' sale of 62.5%[5] of their interests in the Transfer Zone to an Ecuadorian government oil company, "CEPE," without compensating plaintiff for its lost royalty rights. Plaintiff

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[3]Phoenix Canada Oil Co. v. Texaco Inc., 78 F.R.D. 445 (D.Del. 1978); Phoenix Canada Oil Co. v. Texaco, Inc., 560 F.Supp. 1372 (D.Del. 1983).

[4]Dkt.150.

[5]25% was sold in 1974 and 37.5% in 1977.

originally alleged 1) breach of contract by defendants for their failure to continue paying royalties on 62.5% of the Transfer Zone production; 2) breach of contract for delinquent and inadequate payments during three quarters in 1973 and 1974; 3) unjust enrichment for failure of defendants to distribute any portion of the lump sum payment they received from CEPE when CEPE acquired its 62.5% interest in the Transfer Zone; and 4) tortious conduct by defendants in a series of events dating back to 1969.

In 1978 the Court denied defendants' motion to dismiss on grounds of forum non conveniens and under the doctrines of act of state and foreign governmental compulsion. Phoenix Canada, 78 F.R.D. 445. In 1980 it denied from the bench plaintiff's motion for partial summary judgment. (Dkt. 123 at 74). In

1983, the Court 1) rejected defendants' argument that the forum selection clause contained in a 1966 Deed barred litigation in Delaware; 2) decided that Ecuadorian law governed the contract claims involved in this controversy; 3) granted summary judgment in favor of defendants on plaintiff's claim of a contractual right to continued royalty payments on oil produced in CEPE's share of the Transfer Zone; 4) granted summary judgment to defendants on plaintiff's tort claims; and 5) denied defendants' motion for summary judgment on plaintiff's unjust enrichment claims, holding that Ecuador recognized a cause of action for unjust enrichment. Phoenix Canada, 560 F.Supp. at 1372. As the action stood after the last round of motions, the only claims remaining were plaintiff's unjust enrichment claim and its contract

claims arising out of defendants' allegedly late and inadequate royalty payments in the fourth quarter of 1973 and first and second quarters of 1974.

In August of 1983 defendants moved for a declaration of Ecuadorian law under Fed. R. Civ. P. 44.1, filing with the motion supporting affidavits. At a pretrial conference held the next month, it became apparent that before the parties could define and narrow issues for trial, an opinion from the Court was necessary to further delineate the parameters of an unjust enrichment cause of action under Ecuadorian law. The Court therefore declined to sign the parties' 184-page proposed pretrial order[6] and

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[6]As the Court expressed at the conference, the proposed Pretrial Order was inadequate not only because the issues for trial were insufficiently defined, but also because the parties failed to reach agreement on seemingly trivial issues. The proposed pretrial order (continued...)

suggested that responsive affidavits be filed by plaintiff and that briefing proceed if desired by the parties on the Ecuadorian law question. In fact, additional affidavits by experts for both sides were filed, full briefing occurred, and oral argument was held. In addition, the Court received a long awaited report from Rubens Medina, Chief, Law Library, Hispanic Law Division, Library of Congress (the "Medina report"), giving Mr. Medina's opinion on the scope of the unjust enrichment remedy under Ecuadorian law.[7]

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[6](...continued)
would have been of little or no aid in management of the trial.

[7]Fed. R. Civ. P. 44.1 permits a court to consider "any relevant material or source" in its determination of foreign law. On October 25, 1983, the Court formally notified the parties that it would consider Mr. Medina's report and attached to the notice copies of the same. Dkt. 184.

II. Discussion

Defendants make the following contentions in their memoranda and affidavits on Ecuadorian law: first, that the Ecuadorian Civil Code does not expressly provide for a remedy on the facts of this specific case; second, that an Ecuadorian court would not, in the absence of a specific Code provision, recognize a right to recovery on general principles of unjust enrichment; third, that even if a remedy based on general principles of unjust enrichment were recognized in Ecuador, plaintiff would be unable to satisfy its requirements; fourth, that plaintiff is not entitled to the amount it claims for the disputed quarters in 1973 and 1974; and fifth, that plaintiff's action is barred by the forum selection clause contained in the 1966 deed it signed with defendants.

Many of these questions were decided in previous opinions and should not be revisited without good reason. This Court has already held that plaintiff's claims are not barred by the forum selection clause in the 1966 Deed. Phoenix Canada, 560 F.Supp. at 1377-78. Likewise it has already held that Ecuador recognizes a theory of unjust enrichment despite the absence of specific Code provisions. Id. at 1384. Thus, only two of the five issues now raised were not previously decided in earlier decisions: that relating to the parameters of an unjust enrichment theory in Ecuador and that relating to a contract dispute over the three quarters of royalty payments. Defendants have had sufficient opportunity over the past eight years to bring summary judgment motions, and they will not be allowed to reargue

previously decided issues simply because they disagree with the results.[8] Each

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[8]At the most recent pretrial conference plaintiff foresaw this attempt by defendants to revive old issues. Attorneys for both sides engaged in the following discussion with the Court:

> MR. NATHAN [for plaintiff]: I don't want to argue the specifics of the matter. There is a response to it. I have authority, and we will present a response to that, except that which I am concerned with here is that what is being attempted to be developed is a third crack at a motion for summary judgment.
>
> THE COURT: Is that what you are trying to do?
>
> MR. SHERMAN [for defendants]: No, your Honor.
>
> MR. NATHAN: Yes, he is.
>
> MR. SHERMAN: We are trying to explicate the Ecuadorian law, as we understood the opinion directed us to.
>
> THE COURT: And you are not moving for summary judgment again?
>
> MR. SHERMAN: No, your Honor.

(continued...)

issue will be discussed, if only briefly, below.

A. Forum Selection Clause

Defendants' effort to resurrect the forum selection clause issue does not merit discussion. No new facts are advanced nor are any arguments made that could not have been raised two years ago in their last motion. Defense counsel stated at oral argument that he received "some more input" on the issue to present to the Court -- that he retained a new Ecuadorian law expert, Michael A. Schwind, who he asked to review the forum selection clause issue anew. Dkt. 191 at 34-36. Nothing in the Schwind

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[8](...continued)

> THE COURT: No matter what the declaration of the law is, you are going to trial.

Dkt. 179 at 13-14.

affidavit, however, convinces the Court that it erred.

B. Existence of Unjust Enrichment Cause of Action

The unjust enrichment claim deserves a slightly more extended discussion. At the time of the last round of motions, the question of the availability of an unjust enrichment remedy under Ecuadorian law was not briefed by either side until appeals were taken from the Magistrate's Report and Recommendation. As cited in the Court's most recent opinion, on appeal defendants filed a cursory affidavit arguing that no unjust enrichment cause of action existed in Ecuador while plaintiff responded with a more elaborate affidavit supporting the existence of such a remedy. Phoenix Canada, 560 F. Supp. at 1383-84. Defendants argue that the late birth of the unjust enrichment question entitles them

now, on the eve of trial, to attempt to show that contrary to the Court's earlier decision Ecuador does not provide a general unjust enrichment remedy.

Defendants should not have been surprised by the Magistrate's ruling that Ecuadorian law applies to this action -- that was defendants' litigating position all along. Thus, defendants' earlier record, or lack thereof, on the unjust enrichment issue cannot be blamed on a unexpected turn of events. They could have presented the same arguments they now advance two years ago. Law of the case would not, of course, prevent a court from correcting an erroneous determination of law pronounced in a preliminary ruling. Rule 54(b) expressly permits a court to revise its decisions at any time before entry of a judgment adjudicating all claims in an action.

Fed. R. Civ. P. 54(b). On the other hand, interests of judicial economy and in the speedy and inexpensive resolution of litigation dictate that limits be imposed upon the filing of successive, redundant motions.

The Court has read thoroughly all submissions by defendants' experts and sees no compelling reason to reverse the holding of its prior opinion. The issue now advanced -- that without a specific Code provision an unjust enrichment action cannot be maintained in Ecuador -- was specifically addressed by the Court:

> The absence of a specific code provision has little bearing when general principles and interpretation indicate recognition of the theory and these latter embodiments of Ecuadorian law remain unchallenged. Even though a fundamental premise of civil law systems considers law or remedy making by the judiciary an anathema, civil law courts, nonetheless, often fill the interstices of civil codes by

> recourse to general principles or "customary" principles.

Phoenix Canada, 560 F. Supp. at 1384.

This holding is supported in the recent affidavits by plaintiff's experts, Dr. Henry P. De Vries and Rene Bustamante Munoz, as well as by the independent opinion of Mr. Medina. They explain that a claim under Ecuadorian law need not arise under the precise language of a specific Code section.[9] The Ecuadorian Civil Code, according to these experts, contains several provisions granting judges the authority to interpret law and fill in gaps by resort to general legal principles. Article 18, paragraph 7, reads: "When there is no applicable legislation, other laws applicable to similar cases may govern.

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[9]Affidavit of Henry P. De Vries at 9, Dkt. 182; Letter Opinion of Rene Bustamante Munoz at 1, 5, Dkt. 183; Medina Report at 5, 9-10, Dkt. 184.

If there are no laws in existence, the general principles of universal law must be consulted." Civil Code Art. 18, par. 7 (7th ed. 1981), contained in Dkt. 184 at App. 2 (emphasis added). Similarly, the Code of Civil Procedure requires that a judicial decision, in the absence of a specific legal provision, be founded on "principles of universal justice."[10] Moreover, obscure and contradictory Code sections, the Code explains, are to be interpreted in accord with "natural equity." Civil Code, Art. 18, par. 6, Dkt. 184 at App. 2.

Unjust enrichment theory, all parties agree, is embodied in several Code provisions. Art. 1480 provides that obligations can be generated by "a vol-

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[10]Mr. Medina cites this provision as Code of Civil Procedure Art. 194 (Dkt. 184 at 5), while Mr. Bustamante cites it as Art. 294 (Dkt. 183 at 4).

untary action of a person who assumes an obligation . . . as well as in all quasi contracts." Dkt. 184 at App. 3. Three "principle" quasi contracts are enumerated in Arts. 2211-2232. These are "the unsolicited agency, the payment of something not owed, and the community." Dkt. 184 at App. 6. Defendants contend that plaintiff's action falls outside these three categories of quasi contract. In contrast, plaintiff's experts assert (although not too strenuously) that defendants might be liable under these Code sections. See De Vries Affidavit, Dkt. 182 at 8; Bustamante Letter Opinion, Dkt. 183 at 4. The Court need not decide, however, whether the present action falls squarely within those three enumerated quasi-contract provisions. It is possible that ambiguities in those provisions, interpreted

in accordance with "natural equity," might well lead to a statutory basis behind plaintiff's claim. But as all experts save defendants' agree, the lack of a Civil Code section would not bar recovery under a general theory of unjust enrichment. Plaintiff therefore has a valid cause of action for unjust enrichment under Ecuadorian law independent of the three enumerated quasi-contractual obligations.[11]

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[11]In his final reply affidavit, defendants' expert, Mr. Schwind, argues that the 1941 case of Antonia Negrete v. Zoila Negrete, Gacete Judicial S.6, No. 7, 612, prevents recovery for any obligation other than ones enumerated in Art. 1480 -- contract, quasi-contract, tort or a provision of law -- and bars recovery for any but the three enumerated quasi-contracts. Because of defendants' interjection of the Negrete decision only in its final reply affidavit, plaintiff's experts had no opportunity to respond. Plaintiff's brief, however, adequately disposes of Negrete. As a civil law jurisdiction, Ecuador's judicial decisions are not binding precedent. See R. Schlessinger, Comparative Law 550-52 (4th ed. 1980). In the face

(continued...)

IV. Parameters of Unjust Enrichment Cause of Action

Defendants agree with plaintiff that if an Ecuadorian court were to allow a general unjust enrichment cause of action, the court would apply the action "de in rem verso" as defined by two Chilean legal scholars, Professors Arturo Alesandri Rodriquez and Manuel Somarrive Undurraga.

Alesandri and Somarriva describe the five elements of this cause of action as follows:

> 1. There must be an unjust or illegitimate enrichment for one of the parties. In this regard, it should not be understood that there is an en-

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[11](...continued)
of overwhelming modern scholarly support for the position that Ecuador would recognize a general cause of action for unjust enrichment (as have other civil law jurisdictions and, in particular, neighboring Chile), this Court does not believe the Negrete case should be accorded the broad interpretation and effect that defendants propose to give it.

richment only when the net worth of the person concerned experiences a real and effective increase . . . . There may not be a real increase such as when expenditures are avoided, thus preventing a decrease in the net worth.

2. There must be a reduction of the net worth of the other party who thus becomes poorer. This is similar to the effects observed in communicating vessels. The enrichment of one party is the cause for the other's becoming poorer. It should not be understood, however, that there must be a material reduction of the net worth of the person who becomes poorer, or that there must be a displacement or loss of property, because there may also be losses caused by unpaid services rendered.

3. The enrichment must be illegitimate, unjustified. In other words, there must be a legitimate cause for the enrichment to be legally acceptable. For instance, he who enriches himself with a donation, a testament, or a legitimate transfer of ownership has nothing legally reproachable.

4. The party sustaining the reduction or loss must not have any other available remedy.

> 5. That the action based on unjust enrichment be not in violation of current statutes . . . .

Alesandri & Somarriva, 4 Curso di Derecho Civil ¶ 1233 (1942), as translated and abbreviated by R. Medina, Dkt. 184 at 11. See also translation by R. Bustamante Munoz, Dkt. 167 at 5-6.

Defendants contend that plaintiff fails to meet four of these elements as a matter of law: 1) enrichment of defendants; 2) loss to plaintiff; 3) lack of justification for enrichment; and 4) absence of law barring the remedy. The Court, however, believes that triable issues of fact remain to be litigated with regard to each of these elements.

A. Enrichment of Defendants

Defendants argue that because their net worth, or "patrimonios," did not increase as a result of the sale to

CEPE, they were not enriched for purposes of the Alesandri and Somarriva action de in rem verso. After losing 62.5% of their future oil production and their oil producing assets, as well as 50% of their pipeline assets, defendants contend, the government compensated them only for the value of their assets, not future oil production. Thus, defendants calculate, their net worth decreased.

This issue was raised and decided in the previous opinion. The Court held that although CEPE's purchase price may have been calculated on the basis of the book value of assets, a material issue of fact existed as to whether defendants realized a gain on the transfers to CEPE. Phoenix Canada, 560 F. Supp. at 1385. Furthermore, the Court explained, even if defendants realized no "profit" on their sales to CEPE, if they were

compensated for future oil production, then part of what the defendants received was gained at the expense of plaintiff. Id. & n.37. If defendants received compensation for future oil production -- production that had been subject to plaintiff's 1% royalty -- then they should be considered enriched by the 1% payments they otherwise would not be entitled to retain.

B. Loss to Plaintiff

This element is a corollary of the preceding. Without a sale to CEPE plaintiff would have been entitled to a royalty payment. If it is determined at trial that on sale defendants received compensation for future oil production, that portion representing plaintiff's lost royalty interests would constitute

an impoverishment of the plaintiff.[12] The impoverishment of plaintiff, moreover, would satisfy the "communicating vessel" element of Alesandri and Somarriva's theory: defendants' retention of plaintiff's royalty rights would be the

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[12]Plaintiff's position has been that it is entitled to the full value of its lost royalty interest -- or over $26 million. See Proposed Pre-Trial Order, Dkt. 178 at 165-66. That, however, is not the measure of its loss. Rather, plaintiff's unjust enrichment damages would be no more than one percent of that portion of defendants' lump sum payment that reflected future oil production. Thus, at most, if 100% of defendants' payments were given in return for future oil production -- a factual question in dispute -- plaintiff would be entitled to only $2 million (accepting plaintiff's figure of a $200 million sale price -- Dkt. 178 at 166). Defendants contend that this figure would further be subject to an 86% reduction to reflect government taxes that would have been imposed on plaintiff. The Court disagrees. If Ecuador wishes to tax a damage award in this case, that is the government's business. But the defendants cannot be allowed to retain for themselves money that they argue would otherwise go to the state.

direct cause of plaintiff's impoverishment.

C. Justification for the Enrichment

Defendants argue that whenever a defendant's enrichment is derived from a contract with a third party -- in this case a contract with the Ecuadorian government -- the enrichment is legitimate and fails the third element of the action de in rem verso. Furthermore, in their contracts with CEPE, defendants argue, the government merely compensated defendants for their investments as was required by international law. Dkt. 188 at 20. Again, however, as held in the prior opinion, there is a material issue of fact in dispute as to whether defendants received compensation for future oil production, not merely for assets. If, in fact, defendants received money from the sale of future oil production

rights, then part of their compensation consisted of plaintiff's royalty rights. Defendants cannot seriously contend that under Ecuadorian law a contract with a third party to appropriate the property of another will be "justified" for purposes of an unjust enrichment remedy.

Defendants further argue that in "Resolution 11927" the Ecuadorian Minister of Natural Resources terminated plaintiff's royalty rights and therefore plaintiff retained no royalty interests for defendants to appropriate. Resolution 11927, however, decided only that CEPE's interest in the Transfer Zone should be excluded from future assessments of plaintiff's royalty rights. See Phoenix Canada, 560 F. Supp. at 1377, 1380. It did not decide that defendants' sale to CEPE relieved them of any equitable obligations they might owe

plaintiff to share their proceeds. Thus, while Resolution 11927 extinguished defendants' continuing obligation to pay future royalty payments, it did not eliminate all equitable obligations between defendants and plaintiff that arose out of their prior contractual relationship.

D. Statute Barring Remedy

While no specific Code provision bars plaintiff's remedy, defendants argue that Resolution 11927 is an expression of Ecuadorian law that would be circumvented by plaintiff's proposed relief. To the contrary, as just explained, Resolution 11927 dealt only with future methods for calculating royalty payments in the Transfer Zone. Allowing plaintiff to recover 1% of proceeds representing future oil production would not conflict with that Resolution.

This was implicitly decided in the prior opinion denying defendants' motion for summary judgment on the unjust enrichment claim.

Defendants further argue that the "spirit of Ecuadorian law" requires that they be awarded a "credit" for their investments before plaintiff may recover damages. The Code provisions relied upon by defendants as reflecting this "spirit," however, do not apply to this case. Those provisions require reimbursement for improvements on land or chattels made by a person in possession and require reimbursement in other cases where one party incurs expenses that directly benefit another. See Reply Affidavit of M. Schwind, Dkt. 186, ¶ 49-51; see also Dkt. 188 at 22-23. The Court does not believe that this theory of reimbursement would be extended to

allow defendants to offset by their pre-existing investment costs a wrongful retention of money representing plaintiff's royalty rights.

V. Remaining Contract Claims

The heart of plaintiff's remaining contract claims is its allegation that defendants calculated plaintiff's royalty for the disputed three quarters using an incorrect price reference. Defendants assert that their 1965 contract required calculation of plaintiff's royalties based on the same price used to calculate royalties payable to the government under the 1961 Concession Contract -- the West Texas sour crude oil price. Plaintiff, on the other hand, claims that the much higher government reference price should have governed its royalty payments. Both parties agree that Resolution 11927 contains the an-

swer to this dispute.

The issues before the Minister of Natural Resources were twofold: first, how to resolve various disagreements under the 1965 contract regarding calculation of royalty payments and, second, how to calculate the government's 86% royalty tax on those payments. See Dkt. 137B, Ex. 23; Affidavit of M. Schwind, Dkt. 177 at ¶ 47; see also Phoenix Canada, 560 F. Supp. at 1380. Defendants argue that Resolution 11927 arrived at disparate results: the 86% tax for the quarters in question was to be calculated using the government reference price while the remaining 14% royalty payments were to be based on the West Texas price (with the government reference price to govern only future payments). Plaintiff's experts did not rebut Mr. Schwind's affidavit on this

point.[13] Instead, plaintiff merely argues in its brief that this interpretation of Resolution 11927 is "illogical." Dkt. 189 at 25. The Court disagrees. All parties agree that Art. 10 of the Resolution expressly provided that the Central Bank of Ecuador should audit prior assessments and recalculate the 86% tax using the Ecuadorian reference price. See Dkt. 188 at 25; Dkt. 189 at 25. Article 11, however, then states clearly:

> Provisions of the Present Regulation, insofar as they refer to the 14% of the successors in the rights of the grantees, shall be applied from the present date without prejudice to publication in the Official Registry.

Dkt. 137B at A-218. The Court believes that Mr. Schwind's explanation of Arti-

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[13]Plaintiff did submit an affidavit by its President, S. Donald Moore, a non-lawyer, giving his interpretation of the Resolution. Dkt. 181 at 14-17.

cles 10 and 11 is correct. Article 11 provided prospective treatment for the 14% royalty payments while Article 10 applied the government reference price retroactively for purposes of the 86% tax. It is not illogical, as plaintiff argues, that the Minister would have left intact the parties' prior contractual arrangement for past periods while at the same time extracting taxes from defendants based on the higher government reference price.[14] This is what Resolution 11927 appears to say, and this Court must give that Resolution the effect it is entitled to under Ecuadorian law.

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[14]The 86% tax payments, apparently, were to be paid to the Central Bank of Ecuador by defendants, not by plaintiff. See Affidavit of M. Schwind, Dkt. 177 at 23-24.

VI. Conclusion

This case will proceed to trial on plaintiff's unjust enrichment claim under a theory of action de in rem verso as described by Professors Alesandri and Somarriva. The Court understands that plaintiff may have a few lingering contract claims of minor pecuniary significance relating to the three quarters in 1973 and 1974. If plaintiff so desires, those claims too will proceed to trial. The Court will enter an order setting a date by which the parties should submit a manageable proposed pretrial order.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

PHOENIX CANADA OIL COMPANY LIMITED, Plaintiff,	)	Civil Action No. 76-421 MMS
v.	)	
TEXACO, INC., GULF OIL CORPORATION, TEXACO PETROLEUM CO. & ECUADORIAN GULF OIL CO., Defendants.	)	

ORDER

At Wilmington this 17th day of May, 1985, following a pretrial conference held on May 17, 1985,

IT IS ORDERED that footnote 12 of the July 20, 1984, Memorandum Opinion (Doc. 192) be and is hereby withdrawn.

/s/ Murray M. Schwartz
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

PHOENIX CANADA OIL COMPANY LIMITED, Plaintiff, v. TEXACO, INC., GULF OIL CORPORATION, TEXACO PETROLEUM CO. & ECUADORIAN GULF OIL CO., Defendants.	)))))))))	Civil Action No. 76-421 MMS

ORDER

At Wilmington this 11th day of June, 1985,

WHEREAS, on July 20, 1984, the Court issued a Memorandum Opinion which encompassed, inter alia, "Remaining Contract Claims" (hereinafter referred to as section 5) relating to plaintiff's allegation that defendants calculated plaintiff's royalty for a disputed three quarters using an incorrect reference price, and

WHEREAS, as is more fully set out in said Memorandum Opinion, the Court

relied on the Affidavit of M. Schwind (Dkt. 177), and

WHEREAS, at the time of the issuance of the July 20, 1984, Memorandum Opinion (Dkt. 192) the Court was unaware that the Ecuadorian Ministry had, at least initially, construed Resolution 11927 in a manner inconsistent with section 5, and

WHEREAS, both plaintiff and defendants had access to information relating to the construction of Resolution 11927 by the Ecuadorian Ministry, but did not share the same with the Court prior to issuance of the July 20, 1984, Memorandum Opinion, and

WHEREAS, M. Schwind prepared his affidavit apparently unaware of the original position of the Ecuadorian Ministry and its later reevaluation of that position, and

WHEREAS, a material issue of fact has now arisen as to how the Ecuadorian Ministry interpreted Resolution 11927 as is more fully set forth in correspondence between the parties between the dates of May 14, 1985, and June 5, 1985, all of which is attached hereto, [attachments omitted]

IT IS ORDERED THAT:

1. Section 5 of the July 20, 1984, Memorandum Opinion is withdrawn.

2. Plaintiff's Motion for Declaration of Ecuadorian Law, Modification of Prior Ruling and Partial Summary Judgment is granted in part and denied in part as follows:

a. Plaintiff's Motion for Declaration of Ecuadorian Law is denied.

b. Plaintiff's Motion for Modification of Prior Ruling is denied except as set forth in this Order and in

this Court's Order of May 17, 1985, said ruling further being amplified in the Transcript of Pretrial Conference held on May 17, 1985 (Dkt. 211).

c. Plaintiff's motion for partial summary judgment is denied.

3. The litigants shall advise the Court in writing no later than June 30, 1985, as to an agreed date by which they will submit a proposed pretrial order.

4. No further case dispositive motions or motions for declaration of Ecuadorian law will be entertained in this eight and one-half year old case.

/s/ Murray M. Schwartz
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

PHOENIX CANADA OIL COMPANY LIMITED, Plaintiff,	)	Civil Action No. 76-421 MMS
v.	)	
TEXACO INC., GULF OIL CORPORATION, TEXACO PETROLEUM CO. & ECUADORIAN GULF OIL CO., Defendants.	)	OPINION

Wilmington, Delaware
April 8, 1983

SCHWARTZ, District Judge

Pending before the Court is defendants' motion for summary judgment which was referred to Magistrate N. Richard Powers. The Magistrate issued Reports and Recommendations on December 11, 1981 (the "December 11 Report") and May 7, 1982 (the "May 7 Report"). Objections and replies have been filed by each party.

I. Background

This case involves a controversy over royalty rights relating to oil ex-

ploration and production in Ecuador. The facts underlying the dispute have been related in a prior opinion, Phoenix Canada Co., Ltd. v. Texaco, Inc., 78 F.R.D. 445 (D.Del. 1978), and in the Magistrate's December 11 Report. Nonetheless, the disposition of this summary judgment motion warrants a recitation of the facts.

Plaintiff, Phoenix Canada Oil Co., Ltd. ("Phoenix") is a Canadian corporation with offices in Toronto, Canada and New York. Defendants are two major oil and gas companies and the wholly-owned subsidiaries through which they transact business in Ecuador.[1] All defendants

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[1]The defendants are: Texaco, Inc. ("Texaco"); Gulf Oil Corporation ("Gulf"); Texaco Petroleum Company ("Texaco Ecuador"); and Ecuadorian Gulf Oil Company ("Gulf Ecuador").

but Gulf, a Pennsylvania corporation,[2] are incorporated in Delaware and, as such, jurisdiction is based upon diversity of citizenship pursuant to 28 U.S.C. § 1332. The Court has considered and denied defendants' motion to dismiss on the basis of forum non conveniens and the doctrines of act of state and foreign governmental compulsion, Phoenix Canada, 78 F.R.D. 445, and plaintiff's motion for partial summary judgment. Docket entry ("Dkt.") 123, p. 74 (denied without prejudice from the bench). The current motion, if granted, would dispose of most, but not all, of the allegations in the complaint.[3]

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[2]Gulf is registered to do business in Delaware and maintains a registered agent within the state.

[3]See Complaint, Dkt. 1, ¶ 58(b). Plaintiff alleges that defendants refused to pay the full amount of gross royalty due through unauthorized deduction for export taxes, pipeline tariffs, (continued...)

In 1961, Minas y Petroleos del Ecuador S.A. ("Minas"), a wholly owned subsidiary of Norsul Oil and Mining, Ltd. ("Norsul"), obtained a concession from the government of Ecuador for the exploration, development, and marketing of petroleum and natural gas deposits in Ecuador's Oriente Province. Minas was to pay royalties for each barrel of oil produced and to construct facilities in order to develop the area covered by the concession. In 1963, Norsul and Phoenix entered an agreement under which the latter gained a fifty percent interest in Minas in exchange for technical and financial assistance.[4]

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[3](...continued)
port taxes and oil utilized for internal consumption and for improper calculation of base figures for gross production volume.

[4]The 1961 concession allowed Minas to transfer its rights if prior governmental authorization was obtained. It
(continued...)

On July 16, 1965, Minas entered into an agreement assigning certain rights to the predecessors of the defendant subsidiaries ("1965 Contract"). Dkt. 137A, Ex. 2. The assignment allowed the subsidiaries to develop an area encompassing approximately fifteen percent of the concession area (the "Transfer Zone") in exchange for $100,000 and a royalty amounting to "the value of . . . two percent (2%) of the net production . . . of all crude oil production in the transfer zone . . . and sold or delivered by the cessionaries." 1965 Contract, at A-49.

After approval by the government of Ecuador, the transfer was accomplished in a conveyance of rights to exploit the

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[4](...continued)
also allowed Minas to return the land, or any portion of the land, to the government at any time. Dkt. 137A, Ex. 1, A-8, A-21--A-22.

Transfer Zone by public deed executed February 26, 1966. Dkt. 137A, Ex. 4 ("1966 Deed").[5] In 1969, defendants publicly announced the discovery of substantial oil reserves in the concession area. Commercial production began in August of 1972 and Minas began receiving a two percent royalty from defendants.[6] Plaintiff alleges that between 1971 and 1973 defendants failed to make timely royalty payments.

Pursuant to a governmental decree, in May of 1973, the Ecuadorian government levied a retroactive 86 percent withholding tax on income resulting from transfers of hydrocarbon concessions. Supreme Decree No. 602, May 29, 1973,

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[5]The 1966 Deed was attached, in an unexecuted form, to the 1965 Contract.

[6]Phoenix claims a one-half interest in the two percent royalty as a successor in interest of Minas. Norsul claims the remaining one-half interest.

Dkt. 137A, Ex. 18. This substantially reduced the income Phoenix derived from its royalty interests. Thus, the government of Ecuador was receiving not only substantial royalties from the defendants for each barrel of oil produced from the Transfer Zone, it also heavily taxed the income to Phoenix from the same oil.

On August 4, 1973, the government of Ecuador issued Executive Decree No. 925 which empowered the Minister of Natural Gas and Energy to renegotiate the terms of the original 1961 concession. Dkt. 137A, Ex. 19. The decree increased the amount of royalty payable by the defendants on each barrel of oil and authorized the Ecuadorian government oil company ("CEPE") to acquire up to 25 percent of the defendants' interest in the Transfer Zone. This option was ex-

ercised in June of 1974,[7] and since that time, defendants have refused to pay Phoenix 25 percent of the gross royalties from subsequent production. Defendants have also refused to remit to Phoenix any share of the proceeds of the sale of defendants' interest to CEPE.[8]

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[7]Decree No. 925 provided for exercise of the option in mid-1977 but on January 2, 1974, the Ecuadorian government promulgated Supreme Decree No. 09 allowing the Ministry to immediately increase the government's participation in hydrocarbon concessions. Dkt. 137B, Ex. 20. A contract was executed effective June 6, 1974, granting CEPE a 25 percent interest in the gross oil production from the Transfer Zone, certain oil shortage facilities, and the Trans-Ecuadorian pipeline.

[8]The consideration paid by CEPE for the 25 percent interest was based on four components: first, preproduction investments; second, investments until June 6, 1974, subject to amortization or depreciation; third, the cost of warehoused equipment and materials; and fourth, the depreciated value of components one and two as of June 6, 1974. Dkt. 137B, Ex.20, at A-220. A Peat, Marwick, Mitchell & Co. audit report determined the net capital investment in assets was $180,901,000. Dkt. 137D, Ex.

(continued...)

In 1976 Gulf initiated negotiations with the Ecuadorian government to surrender its remaining interest in the Transfer Zone. Supreme Decree No. 1064 terminated the government's prior contract with regard to Gulf's interest. Dkt. 137C, Ex. 30. On May 26, 1977 Gulf and the government executed an agreement transferring Gulf's rights in the 1973 contract. Dkt. 137C, Ex. 31.[9]

Upon the partial Ecuadorian assumption of defendants' interests in the Transfer Zone, a dispute arose concerning the payment of royalties by defen-

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[8](...continued)
44, at A-563-64. CEPE was to pay 25 percent of this value, or $45,230,000.

[9]The compensation paid by CEPE to Gulf was calculated similarly to the 1974 transfer. Gulf's share in the net producing assets was valued at $73,931,625. Lucas Aff., ¶ 17 n.7; Dkt. 136. Gulf was also compensated for its remaining interest in the Trans-Ecuadorian pipeline, and for materials and supplies.

dants to Phoenix for that portion of oil attributable to the government's interest. Dkt. 137B, Ex. 21.[10] This dispute was brought before the Ministry and specifically addressed the question of whether a 25 percent reduction, reflecting CEPE's interest, in the crude produced from the Transfer Zone was proper

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[10]Plaintiff contends that this dispute was brought not by plaintiff, but by defendants and the Banco de Fomento. This contention, however, has little bearing because Banco de Fomento, as collector of 86 percent tax, was contesting defendants' underpayment of royalties based on the part of production acquired by CEPE -- the same basic contention of Phoenix. Therefore, the parties to the dispute matter little in this context. Furthermore, Phoenix responded to this dispute, contesting defendants' position and stating "as we represent 50% of the remaining 19%, we have the right to ask the Ministry, as Special Judge in all matters pertaining to hydrocarbon contracts, to give its binding interpretation of this problem," and "that a decision on the suspension of payment is expedited as it has harmed us as well as the Banco National de Fomento greatly." Dkt. 137B, Ex. 22, at A-199, A-214.

for purposes of calculating the two percent royalty payable to plaintiff and Norsul.[11] On June 3, 1974, the Ministry issued Ministerial Resolution No. 11927 ("Res. 11927") which, inter alia, found that "there shall be excluded, in order to carry out the assessment of the 2% the percentage of CEPE in the net production." Dkt. 137B, Ex. 23, Art. 6, at A-217.

Defendants sought review of Res. 11927 and a "Sentencia" of the Ministry affirmed the conclusion rendered. Dkt. 137B, Ex. 27. The effect of Res. 11927 and the Sentencia was to reduce Phoenix's royalty base by 25 percent. Similarly, when CEPE acquired Gulf's interest in the Transfer Zone, amounting

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[11]Phoenix specifically argued that the 1965 Contract was inviolate and no reduction was proper. Dkt. 137B, Ex. 22.

to 37.5 percent of the Transfer Zone, Phoenix's royalty base was reduced again. This proportional reduction amounted to 62.5 percent of the original base.

The foregoing synopsis of the facts underlying this dispute should not be considered complete. It simply represents an attempt to place the major landmarks on a factual landscape cluttered with minutiae. The defendants' reduction in royalty payments to Phoenix forms the basis for the claims asserted by Phoenix. These claims fall within three categories: first, a breach of contract action for failure to pay royalties; second, an action for unjust enrichment based upon the failure to distribute any share of the proceeds of the transfer to CEPE of interest in the Transfer Zone; and third, a catch-all

prima facie tort claim alleging that defendants have engaged in a continuing series of acts since 1969 contemplated to destroy Phoenix. The Magistrate recommends that summary judgment be granted in favor of defendants on the first and third causes of action and denied with respect to the unjust enrichment claim. These conclusions and the various sub issues within each category will be considered seriatum.

II. Breach of Contract Claim

Defendants raise three basic issues in relation to the breach of contract claim: first, that the underlying agreements contain a forum selection clause which bars litigation in this Court;[12] second, that under choice of

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[12]While it might be argued that the forum selection clause, if given effect, would bar any litigation in this Court, including the unjust enrichment and tort claims, since the clause is contractual (continued...)

law provisions, Ecuadorian law applies to the controversy and would bar the breach of contract action; and third, the act of state doctrine bars plaintiff's claim for continuing royalties under the contract.

A. Forum Selection Clause

The parties agree that the 1966 Deed contains a clause providing that "all differences which may arise between them shall be discussed at a summary proceeding hearing before any of the Provincial Judges of Pichincha." Dkt. 137A, Ex. 4, Art. 11, A-80.[13] Had this provision been an explicit provision in

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[12](...continued)
in nature, it is treated in this portion of the opinion.

[13]An affidavit submitted by defendants states that the word "discussed" should be read as "resolved." Affidavit of Roque Bustamante Cardenas, Dkt. 136, at 5, n.*. In general, the translations of documents submitted to the Court have not been disputed by either party.

the 1965 contract, it would almost certainly be considered as a forum selection clause, and could be given effect. See Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10 (1972) (forum selection clause identifying a foreign forum given effect unless shown to be unreasonable); see also Republic International Corp. v. Amco Engineers, Inc., 516 F.2d 161, 168 (9th Cir. 1975); Restatement (Second) of Conflict of Laws § 80 (1971).

The crux of the issue focuses first on whether the forum selection clause in the 1966 Deed applies as an integral part of the 1965 Contract, and second, whether it applies to this type of dispute. The Magistrate concluded that the forum selection clause should be construed as applying only to disputes regarding the 1966 Deed and therefore it has no application in this case. Plain-

tiff, understandably, does not challenge the Magistrate's conclusion but noted, in its brief in opposition to defendants' motion for summary judgment, that the issue had been decided by the Court's earlier forum non conveniens decision, Phoenix Canada, 78 F.R.D. at 457-58, and as such, constitutes the law of the case.[14]

Both parties, nonetheless, submitted diametrically opposed affidavits from Ecuadorian legal experts concerning the effect of the purported forum selection clause. Defendants, with the sup-

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[14]In the earlier decision the Court found, on the basis of the affidavits submitted, that the parties had not agreed to adjudication of disputes in a particular forum except those between concessionaires. Phoenix, not being a concessionaire, does not fall within the ambit of the clause and defendants admitted at oral argument that this dispute was not one between concessionaires. Phoenix Canada, 78 F.R.D. at 457.

port of their expert, Roque Bustamante Cardenas, vigorously argue that an unexecuted form of the 1966 Deed was attached to the 1965 Contract and was specifically incorporated by the Contract. Dkt. 137A, Ex. 2, A-47.[15] Plaintiff argues that the clause has only limited application to specific disputes and is, at best, ambiguous. The Magistrate found the argument of Jose M. Rumazo, plaintiff's expert, persuasive but was

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[15]Clause THIRD(a) of the 1965 Contract provides, in part:

> [I]t being understood that the transfer shall be made either under the terms of the project, the text of which has been accepted by the parties and, signed by both, is attached to the present instrument as Annex No. 1.

Dkt. 137A, Ex. 2, A-47. It is significant that Bustamante did not refer to this clause in either of his affidavits, rather the reference comes from defendants' brief in support of their summary judgment motion. See Dkt. 136, 163.

unwilling to adopt one view over the other. Rather, he based his decision on the nature of the two documents. The Court agrees with the Magistrate's recommendation that the forum selection clause not be given effect in this instance. Furthermore, since this involves essentially a question of foreign law, pursuant to Fed. R. Civ. P. 44.1, the court determines, as a matter of law,[16] that the forum selection clause was not incorporated into the 1965 Contract in such a way to mandate that this dispute be determined by an Ecuadorian court. The basis for this ruling is rather simple: The Bustamante affidavit is cursory and conclusory whereas the Rumazo affidavit furnishes a detailed

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[16]Questions of foreign law are determined by the Court rather than by the fact finder as was the practice before the current version of Fed. R. Civ. P. 44.1.

explanation of Ecuadorian legal principles regarding forum selection clauses. Furthermore, if the parties intended there to be a forum selection clause applicable to the contractual relationship, they would have done so in the 1965 Contract. Defendants' bootstrap incorporation argument will not overcome the telling absence of such a provision in the corpus of the agreement.

Defendants' objections raise several other arguments which may be disposed of summarily. First, Clause 11 of the 1966 Deed refers to "all differences." Defendants assert that the phrase in the Deed refers to the 1965 Contract simply by its attachment as an annex to the contract. To state the proposition stripped of its adversarial gloss demonstrates its lack of merit. Second, defendants object to the Magis-

trate's characterization of defendants' motion as one grounded on forum non conveniens. While defendants assert the motion is not so grounded, they fail to state any alternative grounds upon which it is grounded. Finally, defendants' mistakenly rely on Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981), for the proposition that a foreign citizen has no "right" to seek redress in United States courts. Piper was a forum non conveniens case based on 28 U.S.C. § 1404 and is factually distinct because of the identity of the parties and the existence of American interests.[17]

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[17]In Piper all parties except for the manufacturer of the aircraft involved in the accident, which was the subject of the litigation, were Scottish. The accident occurred in Scottish airspace. In the current context, two of the defendants are United States citizens, the plaintiff has significant contact with the United States and, more important, the plaintiff is not Ecuadorian.

In conclusion, the forum selection clause pertains to the 1966 Deed and not the 1965 Contract. As such, it has no bearing on the conduct of litigation in this Court with respect to the breach of contract claims.

B. The Law Applicable to the Breach of Contract Claim and its Application

The Magistrate concluded that Ecuadorian legal principles are applicable to the breach of contract claim. He based this conclusion not on vague references in the 1965 Contract and 1966 Deed as asserted by defendants but rather on applicable choice of law principles.[18]

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[18]The Court concurs with the Magistrate and finds what defendants forward as the choice of law provisions as merely exhortary. These clauses simply refer to the companies as "Ecuadorian Companies," and affirm an interest to act in accordance with Ecuadorian law. In the absence of an effective provision, the Court will apply general

(continued...)

As this action sounds in diversity, this Court must apply Delaware's choice of law provisions. Klaxon Co. v. Stentor Electric Manufacturing Co., 313 U.S. 487, 496 (1941). Generally, Delaware courts apply the rule that the law of the place of contracting governs the validity and construction of a contract. Pauley Petroleum, Inc. v. Continental Oil Co., 231 A.2d 450, 457 (Del. Ch. 1967), aff'd, 239 A.2d 629 (Del. 1968). The Delaware Supreme Court, however, indicated a movement toward the adoption of the "most significant relationship" test embodied in section 188 of the Restatement (Second) of the Law of Conflicts. Oliver B. Cannon & Son, Inc. v. Dorr-Oliver, Inc., 394 A.2d 1160, 1166

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[18](...continued)
choice of law principles. See Restatement (Second) of the Law of Conflicts § 188.

(Del. 1978) (citing § 188).[19] Under this test, applying the enumerated factors, Ecuadorian law clearly applies. The place of contracting was Ecuador; virtually all negotiations occurred in Ecuador; the place of performance was both Ecuador and New York; the subject matter of the contract is located in Ecuador; and finally, the domicile, residence, nationality, place of incorporation and place of business of the parties include Ecuador, Delaware, Texas, New York, Pennsylvania, and Canada. Under either the traditional test or the "most significant relationship" test the applicable law is that of Ecuador.

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[19] See also Process and Storage Vessels Inc. v. Tank Service Inc., 541 F. Supp. 725, 729 (D. Del. 1982); Selion v. General Motors Corp., 521 F. Supp. 978, 981 (D. Del. 1981); Tew v. Sun Oil Co., 407 A.2d 240 (Del. Super. Ct. 1979).

Plaintiff disputes the conclusion with largely untenable arguments. First, plaintiff contends that validity of neither the 1965 Contract nor the 1966 Deed is at issue and therefore, the law of the place of performance, New York as alleged by plaintiff, rather than the place of contracting, Ecuador, should govern. The Court agrees with the Magistrate's conclusion that validity of the contract and deed is indeed at issue because the validity of deed provisions, the status of CEPE and the construction of the value of oil subject to royalty are implicated in this proceeding. Second, Phoenix claims that Delaware courts have not yet adopted the "most significant relationship" test of section 188. While the Court agrees with the Magistrate that the Delaware Supreme Court has expressed an inclina-

tion to adopt this test, this issue need not be addressed since under either test, the applicable law is that of Ecuador. Finally, plaintiff claims that even if section 188 is applicable, the place with the most significant relationship is New York -- not Ecuador. Since the only connection with New York comes in the guise of the location where royalty payments were to be made, plaintiff's argument is not persuasive.[20]

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[20]Other elements of plaintiff's protestations on this point are even less convincing. Plaintiff disputes the situs of negotiations as Ecuador. Apparently one negotiating session occurred in Trinidad and none in New York. Plaintiff argues that the place of contract execution has little relevance in this context because the contract could have been executed anywhere and, as such, Phoenix implores the Court to consider the locus of authorization for the contract -- New York and Pennsylvania -- as dispositive. The Court need only note that the contracts were executed in Ecuador by choice of the parties. Plaintiff also quarrels with the characterization of the subject matter of the lawsuit as oil in Ecuador rather than

(continued...)

Concurring with the Magistrate that the substantive law of Ecuador should be applied to the breach of contract claim, the Court now considers his findings regarding that subject. Succinctly stated, the relevant issue concerns the effect and interpretation of Res. 11927 and the Sentencia. As previously noted, defendants requested a ruling from the Ministry regarding the consequences of CEPE's assumption of interest in the Transfer Zone. Defendants rely on Res. 11927, the outcome of this request, as resolving the issue of whether royalty payments need be made on that portion of petroleum production attributable to CEPE's interest in the Transfer Zone. Phoenix, conversely, contends that Res.

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[20](...continued)
the right to receive royalty payments in New York. Since the latter is inextricably tied to the former, plaintiff's argument is facile.

11927 was simply a tax ruling without application to the present litigation. Predictably, the opinions of the experts are diametrically opposed.[21]

Plaintiff mounted basically a two-pronged attack on this issue: first, that Res. 11927 and the Sentencia may not be referred to as representing substantive Ecuadorian law; and second, even if valid and applicable, they are subject to interpretative differences which indicate resolution in plaintiff's favor. The Magistrate rejected both general grounds and recommended granting defendants' summary judgment motion with

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[21]The Magistrate correctly finds that while these differing opinions would normally preclude disposition on a summary judgment motion, since questions of foreign law are questions of law, disposition is not only proper but mandated by Fed. R. Civ. P. 44.1.

regard to the breach of contract issue.[22]

Phoenix objects to the Magistrate's conclusion that Res. 11927 and the Sentencia bar its breach of contract claim for several reasons: first, Phoenix did not bring the dispute to the Ministry as stated by the Magistrate;[23] second, Res. 11927 is susceptible of differing interpretations; third, the Minister had no authority to adjudicate the private rights at issue; fourth, since Res. 11927 is ambiguous, it should be con-

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[22]The Magistrate also correctly found that Res. 11927 and the Sentencia were not being forwarded as foreign judgments, but rather as indicative of Ecuadorian law. See Hilton v. Guyot, 159 U.S. 113, 163 (1895).

[23]As noted, Phoenix participated in this dispute proceeding and indicated that it shared the same interests as defendants and Banco de Fomento. Therefore, this factual misstatement bears little impact on the resolution of this matter.

strued narrowly as a simple tax ruling; and fifth, the Magistrate failed to deal with certain issues raised by plaintiff regarding the political propriety of Res. 11927. These objections provide the Court with scant assistance. Res. 11927 straightforwardly addresses the issue of the amount of oil production in the Transfer Zone subject to royalty payments. Dkt. 137A, Ex. 23, Art. 6. It expressly refers to the two percent royalty -- not the 86 percent tax as plaintiff's construction suggests. The other questions raised by plaintiff largely concern the validity of Res 11927. These objections directly contravene plaintiff's prior position that "the complaint does not challenge the validity, application or purpose of any law of

Ecuador,"[24] a position taken to avoid the strictures placed upon this Court by the act of state doctrine. See infra note 27. In fairness to plaintiff, it had taken the position that Res. 11927 was not the substantive law of Ecuador and therefore it was not questioning the validity of Ecuadorian law. This position apparently has been dropped. Nonetheless, plaintiff has failed to proffer any other basis to discern Ecuadorian law distinct from its attacks on defendants' interpretation.[25] Since Res. 11927 is accorded presumptive vali-

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[24]Phoenix Canada, 78 F.R.D. at 458 (quoting Dkt. 18, at 27).

[25]The Bustamante affidavit is far more persuasive than that submitted by Rumazo. The latter simply addressed Res. 11927's status as law, without citation to authority. Dkt. 139 at 3-5. The former, however, discusses the question exhaustively. Dkt. 143, at 4-10.

dity[26] and it expressly addresses the issue, defendants have not breached the contract and the Magistrate's Report and Recommendation regarding this issue will be adopted.

C. The Act of State Doctrine

Neither plaintiff nor defendants objected to that portion of the Magistrate's Report and Recommendation concerning defendants' claim that the act of state doctrine[27] justifies the

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[26]Phoenix Canada, 78 F.R.D. at 459 n.60; see infra note 27 and accompanying text.

[27]The act of state doctrine finds its doctrinal underpinnings in Underhill v. Hernandez, 168 U.S. 250 (1897), which held that courts of one sovereign should not sit in judgment of acts taken by another sovereign. Id. at 252; see also Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682 (1976); First Nat'l Citz. Bank v. Banco National de Cuba, 406 U.S. 759 (1972); Banco National de Cuba v. Sabbatino, 376 U.S. 398 (1964); Restatement (Second) of Foreign Relations Law of the United States §§ 41-43 (1965). The act of state doctrine is similar to the doctrine of sovereign immunity -- (continued...)

grant of summary judgment on the breach of contract claims. Defendants asserted at the hearing, however, that plaintiff effectively attempts to attack Res. 11927, the law of Ecuador, through this Delaware action. This, according to

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[27](...continued)
both represent principles of judicial restraint which seek to prevent the court from involvement in the area of judging the conduct of a foreign sovereign. The primary distinction between the two doctrines is that the doctrine of sovereign immunity is normally considered in a jurisdictional sense. That is, is the foreign government or its agent immune from suit. It applies only when the sovereign is sought to be made a party to the litigation. See 28 U.S.C. § 1602 et seq. (Foreign Sovereign Immunities Act); Outboard Marine Corp. v. Pezetel, 461 F. Supp. 384, 394 (D. Del. 1978). The act of state doctrine, however, applies once a court determines that it has jurisdiction to adjudicate but it focuses entirely on the action of the sovereign and precludes inquiry into the validity of the action. The act of state doctrine is applicable to litigation, such as this instance, between private parties that are affected by the action of a foreign sovereign. See H. Steiner & D. Vagts, Transnational Legal Problems 672 (2d ed. 1976).

defendants, contravenes the act of state doctrine. The Court has already denied a summary judgment motion based upon the act of state doctrine. Phoenix Canada, 78 F.R.D. at 458-59 (treating defendants' motion to dismiss as motion for summary judgment due to the presentation of affidavits). The Magistrate correctly notes that defendants have simply reasserted their prior claims with the support of additional material. The underlying government actions, however, remain the same and the newly presented materials fail to persuade the Court to alter its prior ruling.

If applicable, a Court utilizes the act of state doctrine to accord a foreign act an irrebuttable presumption of validity and then proceeds to adjudicate the merits of the claim. See Banco National de Cuba v. Sabbatino, 376 U.S.

at 471-72; Zweiban v. Mitchell, 516 F.2d 594, 620 n.68 (D.C. Cir. 1975), cert. denied, 425 U.S. 944 (1976); Phoenix Canada, 78 F.R.D. at 459 n.60. With this in mind, Res. 11927 and the Sentencia are accorded such a presumption and the only justiciable issues concern the interpretation of the governmental decrees. Plaintiff, however, implicitly attacks the validity of the decrees by arguing first, a lack of authority for the Minister to resolve disputes between private parties; and second, the political machinations of Ecuador's military junta. Plaintiff asks this Court to engage in the very activity forbidden by the act of state doctrine. As such, plaintiff's protestations will be disregarded.[28]

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[28]The Magistrate also opined that the decrees relied upon by the defendants do not involve public interests (continued...)

III. Unjust Enrichment

As the Magistrate's December 11, 1981 Report and Recommendation succinctly states:

> Phoenix' [sic] cause of action for unjust enrichment is offered as an alternative remedy if its cause of action for breach of contract is rejected. Phoenix asserts that if it is not entitled to its contracted for royalty from defendants with respect to that proportion of the oil production from the Transfer Zone transferred to CEPE, it is entitled to an equitable share of compensation defendants received from CEPE for the participation rights.

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[28](...continued)
but rather they resolve private corporations' rights and obligations. As such, they are analogous to a judicial decree which normally is not an act of state. Restatement (Second) Foreign Relations Law of the United States § 41, comment (d). As that comment notes, whether an action is an act of state depends not on the branch or the agency taking the action, but instead upon its nature as affecting a public interest. Since this determination is not crucial to disposition of the present motion, the Court expresses no opinion on the Magistrate's conclusion.

According to defendants, they are entitled to judgment in their favor on the unjust enrichment claim as a matter of law for the following reasons. First, under choice of law principles the substantive law applicable to the claim is that of Ecuador, and since plaintiff has conceded that Ecuadorian law does not recognize a cause of action for unjust enrichment, the claim must be dismissed. Second, applying recognized principles of unjust enrichment, the undisputed evidence of record is that defendants were not 'enriched' inasmuch as CEPE compensated them only for capital expenditures and equipment and not for oil drilling rights, so that as a matter of law one of the essential elements necessary to establish a cause of action for unjust enrichment is lacking. Third, assuming that CEPE did compensate defendants for taking over their drilling rights, as a matter of law they have not been 'enriched' since the total amount received from CEPE amounted to less than their capital expenditures on the project. Fourth, since Phoenix received everything it bargained for under the 1965 Contract, defendants have not been unjustly enriched by receiving a partial recovery of their own investment.

December 11 Report, at 36-37. Concluding that material issues of fact exist regarding the unjust enrichment claim, the Magistrate recommends that defendants' motion for summary judgment be denied as to this claim. Plaintiff and defendants object to portions of the Magistrate's Report and each has submitted supplementary affidavits of Ecuadorian legal experts. The four aspects enumerated above correspond to the objections raised and will be treated seriatum.

A. Choice of Law and its Application

The Magistrate concluded that Ecuadorian law should govern plaintiff's unjust enrichment claim under choice of law principles. Finding no Delaware decision regarding the determination of applicable law regarding unjust enrichment claims, the Magistrate applied Res-

tatement (Second) Conflict of Laws § 221 and concluded Ecuadorian law should be applied.[29] Of the enumerated factors,

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[29]Section 221 provides that the law of the state with "the most significant relationship to the occurrence" will govern actions for restitution -- the remedy for unjust enrichment. Restatement (Second) Conflict of Laws § 221(1). It goes on to enumerate the following factors considered to determine the place of the most significant relationship: first, the place where the relationship between the parties centered, provided the enrichment is substantially related to the relationship; second, the place where the enrichment was received; third, the place where the act conferring the enrichment took place; fourth, the domicile and place of business of the parties; and fifth, the location of the land or chattel which was substantially related to the enrichment. Id. § 221(2). The Magistrate found that virtually all factors, as applied herein, point to Ecuadorian law. Plaintiff argues that factual disputes regarding the location of the proceeds of the sale to CEPE exist and that "some" of the funds borrowed by Ecuador to pay defendants came from New York. This amorphous New York contact fails to overcome the Ecuadorian connection. Furthermore, this construction totally ignores the reality of the situation, i.e., that the assets were located in Ecuador and the sale to CEPE took place in Ecuador. Among the parties, CEPE and the subsidi-

(continued...)

only one possible nexus to New York City appears: the allegation that Gulf received payment from CEPE in New York. The Magistrate found that Citibank of New York was CEPE's agent and acted merely as a conduit for payment to Mellon Bank, Gulf's agent, in Pittsburgh. Finding the New York connection ephemeral, the Magistrate concluded that Ecuador had a more substantial relationship to the issue than New York.

Plaintiff, without citation to authority, contends that "[t]he most significant factor in an unjust enrichment claim based on the failure to pay a portion of proceeds to which a constructive trust may attach, is the place

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[29](...continued)
aries are Ecuadorian. Finally, the Court notes that the only substantial connection with New York is the location of counsel.

where the proceeds were received or were held." Dkt. 161, ¶ 56. To a certain extent, plaintiff simply reiterates the point made in section 221 of the Restatement (Second) of the Law of Conflicts, that the enumerated factors should be accorded such weight as their relative importance to the transaction mandates. Nonetheless, plaintiff has shown no substantial connection with New York other than the role of Citibank as a conduit. The transaction which gave rise to the alleged unjust enrichment occurred in Ecuador, concerned Ecuadorian property, and payment was made through an Ecuadorian bank. As such, plaintiff's argument seeks to turn conflict principles on their head.

Upon disposing of this threshold issue by adopting the Magistrate's Report and Recommendation, attention may

now focus on the more important question: whether Ecuadorian law recognizes a claim for unjust enrichment.[30] The

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[30]Defendants argue that plaintiff conceded that the law of Ecuador fails to recognize unjust enrichment when, at the oral argument on defendants' forum non conveniens motion, plaintiff stated that "there is no body of common law equity principles to support a claim for unjust enrichment." Dkt. 13, at 50-51. The Court agrees with the Magistrate's conclusion that this statement was not intended as a concession and will not be considered as such.

Raising the adversarial fracas to even higher heights, plaintiff argues that Ecuadorian law should not be applied because neither it nor the Court were sufficiently apprised of the substantive law. Rather than parse the volte-faces of each party, the Court simply notes that various affidavits now before the Court address Ecuadorian legal principles regarding unjust enrichment, and that Fed. R. Civ. P. 44.1 authorizes the Court to undertake a sua sponte investigation of foreign law. As one commentator notes:

> Once an issue about a certain country's law has been raised, the proof offered by that party should not be limited to that particular statutes or decisions that nay have been identified in that notice. An adverse party cannot complain

(continued...)

Magistrate assumed the existence of such a cause of action based on the failure of defendants to prove the non-existence of the action.[31] There is no need to go

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[30](...continued)
if the court looks beyond those references to other portions of the applicable law or if the party who gave notice seeks to support his position with additional materials.

C. Wright & C. Miller, Federal Practice and Procedure § 2444, at 407 (footnote omitted). Furthermore, the notice afforded need not be specific. Id. § 2443, at 403. The Court has determined that Ecuador recognizes such a cause of action even though the parameters remain undefined at this juncture. See infra pp. 16-18 and accompanying notes.

[31]As the moving party, defendants bear the burden of proving foreign law. Fed. R. Civ. P. 44.1; see C. Wright & C. Miller, Federal Practice and Procedure § 2447, at 415-16. While the failure to prove foreign law may result in application of the domestic law of the forum on the assumption that foreign law would be the same, this procedure has limited application to cases involving a total lack of exposition of foreign law -- a situation distinct from this case. See Bowman v. Grolsche Bierbrouwerij B.V., 474 F. Supp. 725 (D. Conn. 1979).

as far as the Magistrate because the parties have supplied affidavits of Ecuadorian legal experts regarding the prospects of a claim based upon unjust enrichment under Ecuadorian law. At the outset, the parties' experts agree that the Civil Code of Ecuador contains no specific section allowing such a claim. See Reply Affidavit of Roque Bustamante Cardenas, Dkt. 163, ¶ ¶ 6-8; Affidavit of Rene Bustamante Munoz, Dkt. 167, ¶ 7. The parties differ, however, as to whether such an action remains viable under other principles embodied by Ecuadorian legal concepts.

Defendants' expert states a general principle regarding civil law jurisdictions in the following passage:

> Since Ecuador is a civil law jurisdiction, the rights and remedies available to litigants are only those which are set forth in Ecuador's legal codes, statutes and regu-

> lations or provided for by contract between the parties.
>
> * * *
>
> Because there is no provision in the Ecuadorian legal codes, statutes or regulations nor in the parties' contractual arrangements that would entitle Phoenix to a share of the lump sum payments made by CEPE to defendants, Phoenix's claim to such a share, if it were brought under the law of Ecuador, would be dismissed as a matter of law.

Supplemental Affidavit of Roque Bustamante Cardenas, Dkt. 163, ¶ 8. In general, the codes of a civil law country provide all the rights and remedies available to litigants. If a cause of action is not provided for in the code, it will be unavailable. This premise ensues from the fundamental distinction between common law and civil law jurisdiction: the former permits courts to fashion law and remedies while the latter permits courts only to apply and

interpret the code as a comprehensive entity. See generally R. Schlesinger, Comparative Law 410, 433-41 (3d ed. 1970). On the other hand, the absence of a specific provision in a civil code will not eliminate a cause of action if recourse may be made to more generalized provisions. Id. at 894-95[32] (discussing use of analogies and general principles to fill gaps in civil codes).

The affidavit submitted by plaintiff provides an exhaustive analysis of the concept of unjust enrichment as embodied by the Ecuadorian constitution, the Civil and Commercial Codes, court precedents and embraced by legal scho-

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[32]It should be noted that even in common law jurisdiction if a cause of action is asserted which does not fall within a recognized category of action, courts will dismiss unless generalized concepts can be culled from other areas to articulate a rationale to permit assertion of the claim.

lars. Affidavit of Rene Bustamante Munoz, Dkt. 167, ¶ ¶ 7-10. This affidavit traces the concept that "one may not become richer at the expense of another" through the codification and interpretation of Ecuadorian law.[33] The concept of unjust enrichment -- basically an equitable premise -- structurally forms the basis for theories of quasi contract. Since the Civil Code of Ecuador recognizes such an action, the general principle of unjust enrichment must also be considered applicable.

In conclusion, defendants have failed to prove the non-existence of the availability of unjust enrichment as a

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[33]The affidavit also refers to legal principles of other countries. At first blush such a reference may appear irrelevant, however, because civil codes are patterned closely after one another, generally those with a common heritage may be considered for guidance and analogy.

cognizable claim under Ecuadorian law. The absence of a specific code provision has little bearing when general principles and interpretation indicate recognition of the theory and these latter embodiments of Ecuadorian law remain unchallenged. Even though a fundamental premise of civil law systems considers law or remedy making by the judiciary an anathema, civil law courts, nonetheless, often fill the intertices of civil codes by recourse to general principles or "customary" principles. The Court finds that a reasonable basis exists to conclude that Ecuadorian law recognizes the concept of unjust enrichment.

B. Compensation to Defendants as Reflecting only Asset and Equipment Value

Defendants strenuously contend that they were not "enriched" by CEPE's assumption of participation in the Trans-

fer Zone because no payment was made for oil drilling rights. Rather, payment to defendants was based solely on capital investment and equipment costs. See supra notes 8, 9. The Magistrate recommended a denial of defendants' motion for summary judgment on this ground because ambiguities in the agreements between CEPE and defendants permit the conclusion that defendants were compensated for their drilling rights.

Defendants object to the Magistrate's conclusion because compensation was solely limited to depreciated value of assets yet the Magistrate considered the intent of the parties. Defendants' objections fail to specifically refute the Magistrate's findings regarding the ambiguous nature of the contractual language and leaves the Court in somewhat of a quandary. It may well

be that the language utilized was broader than the test for compensation employed.[34] At this time, however, the Court agrees with the Magistrate that summary judgment is inappropriate.

C. Lack of Enrichment Based Upon Amount of Compensation

Defendants argue that even if the compensation received from CEPE reflected the value of oil drilling rights, no enrichment occurred since they only received the depreciated value of their capital assets. Under this theory, since defendants allegedly spent more than they obtained, Phoenix could obtain

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[34]The Magistrate concluded that the 1974 and 1977 agreements speak in terms of "rights and obligations," "rights and assets" and "Totality of its rights over the assets." (emphasis added). Even though the audits established the value of equipment and this value was utilized as the measure of CEPE's payment, the agreements surely referred to broader principles. See Dkt. 137B, p. A-219, A-220; Dkt. 137C, p. A-377.

only a proportional amount of the net benefit -- here zero. The Magistrate rejected this argument on the basis that defendants had derived substantial profits thereby receiving a return on their capital investment. Since a material dispute exists concerning whether the amount received from CEPE constituted a return over and above capital investment, the Magistrate concluded that summary judgment should be denied.

Defendants object to this conclusion stating it constitutes abject spec-

ulation and is irrelevant.[35] They further assert that plaintiff derived substantial royalty payments in the period preceding CEPE's participation.[36] Plaintiff correctly notes that the amount of profit or loss bears little relation to this controversy since plaintiff's allegation concerns an as-

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[35]Defendants simply state that the method employed to calculate CEPE's payment presumptively demonstrates that the net benefit was zero. This remains unclear and the cases cited in defendants' brief in support of their summary judgment motion shed little light on the problem. None of those cases addresses the issue here presented: whether a benefit was gleaned from past returns on investment which renders the measure of payment based on depreciated value actually reflective of capital returns, thereby resulting in a benefit.

[36]Defendants also refer to royalty payments currently being received by Norsul and Phoenix. Since these payments reflect those producing regions not transferred to CEPE, these payments are irrelevant. What is relevant concerns the simple conclusion that had CEPE not assumed a participatory interest, the royalty payments would be much greater.

serted right to receive compensation for the loss of oil producing property subject to royalty payments.[37] Even though defendants enjoyed the right to assign their interests, since any assignee, other than CEPE, would also assume the obligation to make royalty payments, a material dispute exists as to whether defendants are liable on unjust enrichment grounds. Since it remains unclear as to whether defendants realized a gain upon transfer to CEPE, regardless of the measure used to calculate the amount CEPE would pay, the Magistrate's conclusion will be adopted and the summary judgment motion denied as to these

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[37]Upon initial consideration, defendants' contentions that their net benefit was zero and, hence, no enrichment occurred, appears attractive. Upon reflection, however, it is indisputable that defendants' were extricated in such a way to recoup something while plaintiff recovered nothing.

grounds.

D. Benefit of the Bargain

As a last line of defense in support of its motion for summary judgment as to Phoenix's unjust enrichment claim, defendants argue that Phoenix cannot recover under such a theory because they received precisely what they bargained for. According to defendants, the royalty payments related only to that oil sold or produced by defendants, that if production ceased, no payments need be made, and defendants could freely assign their rights to the government or any other person. The events that occurred, defendants maintain, simply reflect the contingencies provided for in the 1965 Contract and 1966 Deed. The Magistrate summarily dismissed this contention because it fails to consider two contingencies: first, a lump sum payment for

any such assignment; and second, governmental action abrogating Phoenix's right to receive royalty payments.

Defendants predictably object on the basis that plaintiff would have the Court rewrite the contracts to allow an unjust enrichment claim. Despite their protestations, the agreement entered by the parties provided for some, but not these particular, contingencies. As such the Magistrate's reasoning is sound and will be applied.[38]

In conclusion, Ecuadorian law is applicable and recognizes the unjust

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[38]Defendants also assert an insufficient showing of Ecuadorian legal principles regarding this claim. Since the effect of this ruling is to apply Ecuadorian law to the claim, the parties are expected to develop the applicable principles. The Court holds that Ecuador clearly recognizes the theory of unjust enrichment. The extent of recovery as the theory is applied in this case, however, currently remains unclear.

enrichment claim; material factual disputes exist regarding the assets for which compensation was received; material factual disputes exist regarding whether defendants received a benefit; and material factual disputes exist as to whether the contract precludes the claim. The Court is well aware of defendants' allusion to the United States Court of Appeals for the Third Circuit's treatment of Fed. R. Civ. P. 56(e). Despite defendants' characterization, plaintiff has not asserted an impermissible lack of knowledge by not providing a detailed treatment of the Ecuadorian law because Phoenix has maintained throughout the proceeding that Ecuadorian law was inapplicable to this claim. While the affidavit of Rene Bustamante Munoz contains an exposition of the possible bases for a claim of unjust

enrichment, the application and parameters of the substantive nature of the claim have not been delineated. While this failure of the plaintiff to offer an alternative framework for analysis is unfortunate, it should by no means deprive the plaintiff of its cause of action. The Court decides today only that Ecuadorian law applies and does not bar the claim. In the absence of further development of Ecuadorian law,[39] the

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[39]The Court is, of course, free to utilize resources at its disposal to conduct a non-partisan inquiry into substantive Ecuadorian law concerning the application of the theory of unjust enrichment to the facts of this case, and has done so. By letter dated December 30, 1982 the Court requested the assistance of the Library of Congress regarding the existence and parameters of a claim for unjust enrichment under Ecuadorian law. If and when the Court receives a response to this request, the parties will be notified and, pursuant to the preferred procedure under Fed. R. Civ. P. 44.1, the parties will be afforded a limited opportunity to comment. In any case, it is expected that the parties will begin to address the speci-

(continued...)

Court may presume that the body of law would be identical to the law of the forum.[40]

IV. Prima Facie Tort Claim

The third basic theory asserted by Phoenix in its complaint concerns an allegation that defendants engaged in a

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[39](...continued)
fic application of Ecuadorian law to plaintiff's unjust enrichment claim in anticipation of trial.

[40]The law of Delaware, the forum, would be the alternative body of legal principles -- not that of New York as contended by plaintiff. See Corporacion Venezolana de Fomento v. Vintero Sales Corp., 452 F. Supp. 1108, 1112 n.3 (S.D.N.Y. 1978), remanded, 607 F.2d 994 (2d Cir. 1979); cf. Symonette Shipyards, Ltd. v. Clark, 365 F.2d 464, 468 n.5 (5th Cir. 1966), cert. denied, 387 U.S. 908 (1967) (prior to current version of Fed. R. Civ. P. 44.1); Segusos Tepeyae, S.A., Compania Mexicana de Seguros Generales v. Bostrom, 347 F.2d 168, 174 n.3 (5th Cir. 1965) (same); C. Wright & A. Miller, Federal Practice and Procedure, § 2447, at 416. But cf. Bowman v. Grolsche Bierbrouwerij B.V., 474 F.Supp. at 730 (applies law of place of performance; however place of performance same as forum).

continuing scheme to destroy it as an economic entity.[41] The Magistrate's December 11 Report requested additional briefing concerning the issue of whether plaintiff's claim was time barred. Briefs were submitted and the Magistrate issued the second report on May 7, 1982. That Report concluded the tort claim was time barred with respect to acts of defendants occurring before November 26, 1973, and that the subsequent acts do

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[41]For example, plaintiff's Complaint alleges:

> Commencing about 1969, and continuing to the present, in New York, Florida and elsewhere, the defendants agreed upon, developed and implemented plans, schemes and a conspiracy to eliminate or impair plaintiff's gross royalty interest, to destroy plaintiff as a going concern, to remove plaintiff as a competitor in Ecuador and elsewhere and to reap whatever financial benefits would flow therefrom as more fully alleged hereafter.

not state a cause of action in tort. The Magistrate considered several aspects of this cause of action: first, the underlying facts; second, the applicable statute of limitations; and third, the substantive nature of the tort.

A. Facts Underlying the Prima Facie Tort Claim

In support of the general allegation that defendants attempted to destroy plaintiff as a participant in the oil production business, the complaint lists a series of specific acts beginning in 1969. Several of the individual acts contain allegations of injury. The Magistrate summarized these as follows:

> Defendants made false claims that certain oil-producing lands were not within the area of the concession. This caused injury because trading in Norsul stock was suspended by the SEC and the value of the stock plummeted, hampering Plaintiff's efforts to raise capital. [Dkt. 1, at ¶ 18.]

Defendants made unjustified requests to Plaintiff for documentation to prove Plaintiff's right and title to royalties, causing waste of corporate assets and obstructing Plaintiff's opportunity to conclude financing. [Id. at ¶ 22].

Defendants made false statements about Plaintiff on Ecuador TV which were prominently reported in Ecuador and which impaired Plaintiff's ability to obtain new financing. [Id. at ¶ ¶ 27-28].

Defendants were guilty of unjustified delays in making royalty payments in 1972-1973. [Id. at ¶ 31-34, 40].

Defendants made unjustified demands for a new written agreement in 1973. [Id. at ¶ ¶ 36-39].

Defendants wrongfully utilized special funds. [Id. at ¶ 42].

Defendants made false and malicious statements about Plaintiff to third parties in May 1972-May 1973. [Id. at ¶ 44].

All royalties were withheld by Defendant Texaco on February 26, 1973 without justification, causing a decline in Plaintiff's stock value and

endangering its credibility in the market. [Id. at ¶ 46].

Defendants failed to make royalty payments due April 30, 1973. [Id. at ¶49].

Defendants improperly retroactively applied a selective 86% tax to previous oil production, injuring Plaintiff's credibility and impairing its stock value and its ability to raise capital. [Id. at ¶ ¶ 50-51].

Defendants made unjustified reductions in payments commencing on July 8, 1973. [Id. at ¶ 57].

Defendants failed to properly calculate royalty payments in the Fourth Quarter of 1973 through the Second Quarter of 1974. [Id. at ¶ ¶ 58(b)(3)].

Defendants have failed to pay Plaintiff since June 8, 1974 an equitable portion of the proceeds from CEPE's acquisition of a 25% interest in the consortium and have unlawfully deducted 25% from gross royalty payments due and owing since that time. [Id. at ¶ ¶ 62-64].

Defendants have failed to pay Plaintiff since January 1, 1977 an equitable portion of the proceeds from CEPE's acquisition of a 37.5% interest

> in the original consortium and have unlawfully deducted 37.5% from gross royalty payments since that time. [Id. at ¶ 82].

May 7 Report, at 2-4.

As the Magistrate notes, all but the last four of the alleged incidents occurred prior to November 26, 1973.

B. Statute of Limitations

The Magistrate concluded that, in a diversity action, the applicable statute of limitations is that applicable had the action been brought in state court. Freedman v. Beneficial Corp., 406 F. Supp. 917, 921 (D. Del. 1975). Under Delaware law, tort claims without accompanying force must be brought within three years from the accrual of the cause of injury. 10 Del.C. § 8106. Since the alleged actions occurred outside of Delaware, the shorter of two limitation periods applies, i.e., that

of Delaware or that of the state in which the cause of action arose. 10 Del.C. § 8121. Therefore, three years is the maximum applicable limitation period.[42] Neither party disputes this conclusion.

Plaintiff objects, however, to the Magistrate's conclusion that the statute of limitations relative to each act alleged as the basis for the tort runs separately from the time of injury

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[42]The Magistrate also correctly concluded that the time of accrual of the cause of action will be governed by the rules applicable had the action been brought in state court. Pioneer Nat'l Title Ins. Co. v. Sabo, 432 F.Supp. 76, 78 (D.Del. 1977). Delaware choice of law principles require application of the place where the tort arose. Friday v. Smoot, 211 A.2d 594, 595, (Del. 1965); cf. Paoletto v. Beech Aircraft Co., 464 F.2d 976, 979 (3d Cir. 1972) (if place of act and place of injury differ, latter controls); Zahn v. Transamerica Co., 162 F.2d 36, 40 (3d Cir. 1947) (substantive law applicable of place of last necessary act to complete tort).

caused by each act. As such, acts prior to the date upon which the limitation period began to run are time barred.

C. Substantive Nature of the Tort

The Magistrate reached several conclusions concerning the nature of the prima facie tort: first, that no cause of action exists for a civil conspiracy; second, therefore, the statute of limitation runs from each act; and third, that the acts not time barred fail to state a cause of action. Plaintiff takes issue with each of these conclusions.

Delaware courts do not recognize independent actions for civil conspiracies. Henis v. Compania Arricola De Gustenada, 116 F.Supp. 225, 226-27 (D.Del. 1955), aff'd, 210 F.2d 950 (3d Cir. 1954); Park-In Theaters v. Paramount-Richards Theaters, 90 F.Supp. 727,

729 (D.Del.), aff'd, 185 F.2d 807 (3d Cir. 1950), cert. denied, 341 U.S. 950 (1951).[43] A suit may not be maintained for acts committed that are barred by the statute of limitations simply by asserting that injury did not occur until a later time. See Glassberg v. Boyd, 116 A.2d 711, 717 (Del. Ch. 1955) (allowance of such suits effectively tolls the statute of limitations in an impermissible manner). Phoenix seeks to avoid this construction first by alleging that the Magistrate misconstrued its claim as one for a conspiracy.[44] Phoenix asserts that the acts failed to

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[43]Pursuant to Delaware law, the existence of a civil conspiracy has only two effects: first, to implicate others; and second, to increase the measure of damages. See Laventhol, Krekstein, Horwarth and Horwarth v. Tackmon, 372 A.2d 168, 170 (Del. 1976).

[44]This, of course, ignores the plain language of paragraph 17 of the Complaint. Dkt. 1, ¶ 17.

cause either actual damage or "the kind of injury about which plaintiff is complaining." Dkt. 161, at 11 (emphasis in original). Therefore, absent injury, the accrual of action did not occur. This objection fails to recognize the clear allegations of specific injury associated with the specific acts of the defendants. See Phoenix Canada, 78 F.R.D. at 450-51 (conclusion that Phoenix attributed specific injury to individual acts).

Phoenix attempts to avoid this result by characterizing its claim as one for intentional infliction of economic injury and alleges that under this theory, each individual injury would be insufficient to maintain the claim because the actual injury -- destruction of the business -- had not yet occurred. In effect, Phoenix argues that this tort

evolves from a series of indivisible wrongs which accrue into a claim upon the last act asserted in the chain of events. The simple answer to this theory is that such a construction circumvents the statute of limitations, rendering it a nullity.[45]

More specifically, however, the Magistrate concluded that the courts of New York fail to consider this cause of action an indivisible tort.[46] While

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[45]Defendants also respond that since Phoenix remains a viable entity, the assertion of the tort may not be maintained. The Court finds this contention meritless because the gravamen of the tort is the infliction of economic injury -- not necessarily destruction. Cf. W. Prosser, Torts § 130, at 953 (4th ed. 1971) (tortious interference with prospective advantage concerns economic harm based upon intentional interference coupled with some damage).

[46]Delaware courts have recognized the tort of deliberate interference with prospective business opportunity. See DeBonaventura v. Nationwide Mut. Ins. Co., 428 A.2d 1151 (Del. 1981). Dela-

(continued...)

authority exists for the recognition of such a cause of action under New York law, the cases fail to remove cases of this genre, based upon a series of acts, from application of the statute of limitations. Original Ballet Russe, Ltd. v. Ballet Theatre, Inc., 133 F.2d 187 (2d Cir. 1943) (no indication that alleged acts fell outside period of limitation). Plaintiff objects to this construction and asserts that Original Ballet Russe stands for proposition that an indivisible tort exists. While the court in

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[46](...continued)
ware courts have neither adopted the theory of an indivisible tort nor that of independent civil conspiracy. See supra note 43. Delaware, as a lex loci delicti state, applies the law of the state where the last act occurs which completes the tort. See Tew v. Sun Oil Co., 407 A.2d 240 (Del. Super. Ct. 1979). Applying these principles, the Magistrate concurred with Phoenix's uncontested contention that New York law governs. Because the conclusion is not contested, the Court assumes, without deciding, that New York law governs.

that case did determine that the tort exists and each act need not be pleaded separately, it failed to consider the instant proposition concerning actions occurring outside the limitations period.[47] New York courts have specifically addressed the question of accrual of continuing torts and have concluded that the statute of limitations runs with respect to each act when it occurs. Kory v. International Telephone & Telegraph Corp., 444 F.Supp. 193, 195 (S.D.N.Y. 1938).[48] In conclusion, since

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[47]The other cases cited in support of plaintiff's theory which discussed Original Ballet Russe were civil antitrust cases which, by their very nature, are premised upon a conspiracy. Cardinal Films v. Republic Pictures Corp., 148 F.Supp. 156 (S.D.N.Y.1957); Winkler-Koch Eng'r Co. v. Universal Oil Products Co., 96 F.Supp. 1014 (S.D.N.Y. 1950). As such, these cases are inapposite.

[48]Delaware courts apply the same rule. Glassberg v. Boyd, 116 A.2d at 717.

the three-year limitation period constitutes the maximum applicable, the Magistrate correctly concluded that acts occurring prior to November 26, 1973 are barred as a matter of law.

With these contentions disposed of, the four post-November 26, 1975 acts remain as asserted. The Magistrate concluded that the specific acts constituted mere breaches of contract which fail to state a cause of action in tort. See N.Y. Central & Hudson R.R. Co., 87 N.Y. 382, 393-97 (1932) (to state a claim in tort based upon a contract breach, the breach must be the primary means of inflicting another, and separate harm); see also Luxomony Cars, Inc. v. Citibank, N.A., 65 A.D. 2d 549, 408 N.Y.S. 2d 951, 954 (2d Dept. 1978); Wegamn v. Dairylea Cooperative, Inc., 50

A.D. 2d 108, 376 N.Y.S.2d 728, 734 (9th Dept. 1975).[49]

Phoenix objects to this conclusion by stating that the pre-1973 acts should be considered as the basis upon which to show the separate and distinct motive. This objection might be construed to recognize implicitly that the four post-1973 alleged acts fail to state a claim in tort. Contrary to Phoenix's contention, the Magistrate did not determine that time barred acts could not be utilized to establish a tort that is not time barred.[50] He simply concluded that

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[49]The four acts concern: first, unjustified resolutions in royalty payments; second, improper calculation of royalty payments; third, failure to remit a portion of the proceeds from the first sale to CEPE; and fourth, failure to remit a portion of the proceeds from the second sale to CEPE. See supra p.24.

[50]Phoenix correctly notes that the statute of limitation acts only to bar assertion of a cause of action. It does (continued...)

the prior acts cannot be relied upon to transform a breach of contract claim into a tort claim. To allow such a metamorphosis effectively extinguishes the distinction between contract and tort, vitiates the statute of limitations, and, through artful pleading, resurrects a claim which could not be brought. This toe-hold approach to litigation has no place in this jurisdiction.[51]

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[50](...continued)
not extinguish the claim. This, nonetheless, has no bearing in the current context because the claim, as asserted by Phoenix, is not cognizable under the law of either New York or Delaware. See note 46, supra, and accompanying text.

[51]Phoenix makes the blanket assertion that "[P]laintiff has alleged and can prove at the trial that the breaches of contract which occurred after November 26, 1973, were part of a tortious conspiracy to injure plaintiff." Dkt. 161, at 14-15. Such an assertion, absent a basis in admissible evidence, does not form the basis upon which the Court can deny summary judgment pursuant to Fed. R. Civ. P. 56.

In conclusion, the Court agrees with the Magistrate's conclusion that the prima facie tort claim based on acts prior to November 26, 1973 is time barred. In addition, while an action based on the post-November 26, 1973 acts is not time barred, these acts fail to state a cognizable cause of action.

V. Conclusion

The Magistrate has done a laudable job in making sense of a hopelessly confused morass. In large part, the Court adopts his conclusions and this opinion primarily seeks to amplify those conclusions. Both parties, in their adversarial zeal, have made largely specious attacks on the Magistrate's findings and conclusions. Such tactics seldomly bear fruit, they simply add to the cost of litigation and the exponential expansion of paper.

In conclusion, the Court, pursuant to Fed. R. Civ. P. 56(d), will grant partial summary judgment based upon defendants' motion with respect to the contract and prima facie tort claims. Summary judgment will be denied with respect to the unjust enrichment cause of action.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

PHOENIX CANADA OIL COMPANY LIMITED, Plaintiff,	)	Civil Action No. 76-421
v.	)	
TEXACO, INC., GULF OIL CORPORATION, TEXACO PETROLEUM CO. & ECUADORIAN GULF OIL CO., Defendants.	)	OPINION

Wilmington, Delaware
April 10, 1978

SCHWARTZ, District Judge

Should this case be resolved in the District of Delaware or rather in the nation of Ecuador? After resolving lesser questions and reducing to the nub the sea of papers and rhetoric directed at the Court, that is the essential question that must be confronted in the matter now at bar.

Plaintiff is in a Canadian corporation maintaining offices in Toronto, Canada and New York City and trading its shares on the Montreal Stock Exchange

and the over-the-counter market in the United States. Defendants are two major international oil and gas companies and their wholly-owned subsidiaries through which they transact business in Ecuador. Three of the four defendants are incorporated in Delaware; defendant Gulf Oil Corporation ("Gulf") is a Pennsylvania corporation qualified to do business in Delaware and maintaining a registered agent within the state. Jurisdiction is based upon diversity of citizenship. 28 U.S.C. § 1332.

Defendants have filed two motions:[1] (1) a F.R.Civ.P. 41(d) motion to stay all proceedings pending payment by plaintiff of defendants' costs incurred in a previous action taken by plaintiff against defendants in another jurisdiction and subsequently dismissed by

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[1]Doc. 7.

plaintiffs; and (2) a F.R.Civ.P. 12 motion to dismiss the Complaint.[2] The latter motion is predicated upon three theories: (1) forum non conveniens; (2) act of state and foreign governmental compulsion; and (3) lack of sufficient nexus to the facts for defendants Gulf and Texaco, Inc. ("Texaco") to be sued.

I. Rule 41(d) Motion

This suit in large part concerns rights relating to and deriving from oil exploration and production in Ecuador. On June 23, 1975 plaintiff filed a similar complaint against the same four defendants in the Southern District of New York. On September 17, 1975, defendants moved to dismiss the New York action under the doctrines of act of state and forum non conveniens. The New

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[2]Additionally, defendants sought a stay of all discovery pending resolution of the rule 12 motion. Discovery has not proceeded since oral argument.

York motion to dismiss was essentially the same as that in the matter sub judice. Plaintiff argued that discovery was necessary to respond to defendants' motion.[3] The United States District Court for the Southern District of New York ruled on September 22, 1976 that plaintiff did not require discovery with respect to certain of defendants' "threshold defenses" and directed plaintiffs to file answering papers to those defenses.[4] On October 1, 1976, plaintiff voluntarily dismissed the New York

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[3]The parties dispute, or at least characterize in vastly divergent terms, the amount of discovery that would have occurred. Plaintiff claims that it needed "limited discovery as to matters arising from defendants' motion," while defendants assert plaintiff requested "a massive program of document production and depositions." Compare Doc. 13, at 43 with Doc. 10, at 6.

[4]The Opinion of Judge Charles M. Metzner may be found in [1976] Trade Reg. Rep. (CCH) ¶ 61, 093 (S.D.N.Y. Sept. 22, 1976).

action pursuant to F.R.Civ.P. 41(a)(1) and thereafter filed this action on November 26, 1976.

F.R.Civ.P. 41(d) provides:

> Costs of Previously Dismissed Action.
> If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

Defendants contend that refiling the action in the Delaware district subsequent to the New York dismissal constitutes "blatant forum shopping" by plaintiff to which rule 41(d) "was designed specifically to provide a deterrent."[5] Accordingly, defendants request the Court to stay all proceedings pend-

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[5]Doc. 10, at 7-8.

ing payment by plaintiff of defendants' costs in the New York action, including attorneys' fees.

Plaintiff explains the action was dismissed in New York and recommenced in Delaware to remove antitrust claims in the prior action so as to "reach the merits more quickly and in order to avoid side issues concerning jurisdiction, venue, and plaintiff's standing under the antitrust laws."[6] It urges that a rule 41(d) stay cannot be granted in a second action unless costs were awarded in the similar first action, and no costs were awarded in the New York action in this case. It then argues that with respect to costs attorney's fees are the key issue and such fees properly are not granted under rule 41(d) without evidence of forum shop-

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[6]Doc. 13, at 44.

ping, "which is not the case here whatsoever."[7] Finally, plaintiff claims financial hardship impairs payment of these costs "at this time," and that defendants not only are aware of the financial problems but are "the major cause of them."[8]

Rule 41(d) confers broad discretion upon the federal courts. 5 Moore's Federal Practice ¶ 41.16, at 41-224 (citing cases). The rule is permissive in nature and does not require an automatic stay. Clemens v. Central R.R. Co., 264 F. Supp. 551 (E.D. Pa. 1967), rev'd on oth. grds., 399 F.2d 258 (3d Cir. 1968), cert. denied, 393 U.S. 1023 (1969). The object of the rule is to prevent vexatious suits and secure the payment of costs, but a court will be

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[7]Doc. 20, at 62 (Transcript of oral argument of Sept. 12, 1977).

[8]Doc. 13, at 44.

reluctant to stay an action brought in good faith, especially when a plaintiff financially is unable to pay the former costs. Moore's Federal Practice, supra, at 41-225.

Guidance is provided by two precedents from within this circuit. In Gainey v. Brotherhood of Railway & S.S. Clerks, 34 F.R.D. 8 (E.D. Pa. 1963), the district judge granted a stay until previously assessed costs were paid. Upon reflection, four factors appear to have influenced the Gainey decision: (1) costs had been assessed by the judge in the prior action; (2) the parties to both actions were the same; (3) no showing of financial inability was made; (4) the likelihood of plaintiff's success in the second suit was small. Focusing on the latter three criteria, Judge Higginbotham in Clemens, supra, decided against issuance of a stay. Although

the parties to the actions were the same, and although the judge in the previous action had assessed costs, the court concluded that financial circumstances and the potential for success were such that a stay would be inappropriate. Finally, that district court noted it was not convinced plaintiff was engaged in vexatious litigation. 264 F. Supp. at 563.

It is concluded after applying these criteria and exercising discretion a stay will not be ordered, even though one criterion is fulfilled in that the parties to both actions are identical. First, costs were not assessed in the previous action. Although there was no opportunity for such an assessment because plaintiff effectuated a voluntary dismissal under rule 41(a), plaintiff cannot be said to have defaulted on a preexisting legal duty of payment.

Next, the declaration of financial inability in the matter sub judice is at least comparable to that deemed material in Clemens, supra.[9] Plaintiff has indicated that this lawsuit and the royalty interest at issue in the suit are its principal assets.[10] Plaintiff also claims it "could not, without substantial difficulty, raise sufficient funds

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[9]Clemens was a class action in which the sum of costs when divided among the class amounted to less than $2.50 per person. The district court nonetheless declined to order a stay, reasoning that the class members were retired persons living on small pensions and that staying the action pending payment of costs would reduce plaintiffs' chances of receiving any compensation to which they might be entitled. 264 F. Supp. at 563.

[10]Plaintiff's brief asserts: "Plaintiff has alleged in the complaint that the royalty interest and this lawsuit are its principal assets." Doc. 13, at 44. The Complaint states: "At all times material to this Complaint, plaintiff's sole income-producing assets and operations consisted of its Ecuador gross royalty interests." Doc. 1, at 2.

to pay costs at this time."[11] Further, plaintiff asserts defendants are a major contributor to the financial problems. In light of these representations, the Court is loathe to mandate a stay.

With respect to the final criteria isolated from Gainey, at this time no judgment can be made concerning the likelihood of plaintiff achieving success on the merits. The Court is not prepared to say that the voluntary dismissal of the New York action indicates that plaintiff has no chance for success in this action. Moreover, the purpose of this action does not appear to be to vex or oppress defendants. Given plaintiff's alleged financial circumstances,

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[11]Doc. 13, at 44.

such a proposition appears intrinsically dubious.[12]

For all these reasons, a stay will not be entered pending payment of costs. Additionally, many of the same factors, and others, lead one to conclude that to award costs for the New York action presently would be improvident. The potential financial hardship and the absence of evidence of bad faith in the bringing of this suit[13] weigh heavily

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[12]As understood, plaintiff's explanation for the New York dismissal is that the Delaware suit eliminates antitrust claims and consequently obviates various time consuming preliminary issues under the antitrust laws. Although this reason is superficially plausible, it is not readily apparent why amendment of the New York complaint would not have accomplished the same result.

[13]The Court notes defendants' argument that the burden of proof is upon plaintiff to show the second action is not vexatious. Doc. 10, at 40 n.*. Plaintiff has made a sufficient showing to fulfill the minimal burden. Given the alleged relative economic capabilities of the parties, defendants have not

(continued...)

against a cost assessment. Moreover, at oral argument, defendants represented that they are "not making a major issue" of plaintiff's inability to pay attorneys' fees.[14] Given this representation

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[13](...continued)
succeeded in overcoming plaintiff's minimal showing. To the extent defendants believe plaintiff seeks to relitigate matters already decided in the New York action, see Doc. 18, at 29-30, they may demonstrate to the Court at the proper time that those matters previously have been resolved. In another context, a plaintiff has been denied a second opportunity to litigate a matter already decided. Pastewka v. Texaco, Inc., 420 F. Supp. 641 (D. Del. 1976), aff'd, 565 F.2d 851 (3d Cir. 1977).

[14]The complete statement is: "I've read Plaintiff's statement that they couldn't afford to pay attorneys' fees. And I'm not making a major issue of that." Doc. 20, at 28.

Apart from this representation, a serious question exists whether attorneys' fees may be considered as costs of the first action, particularly where no costs were awarded by the judge in the first action. Defendants cite Eager v. Kain, 158 F. Supp. 222 (E.D. Tenn. 1957), to support the proposition that attorneys' fees may be included. Plaintiff counters that the Eager language specified by defendants is dictum and
(continued...)

and that the remaining costs would probably not be substantial,[15] costs will not be assessed for the prior action as a precondition to permitting plaintiff to go forward at this time.

Finally, as an exercise of discretion and to assure complete fairness, should plaintiff ultimately succeed on the merits in this action, defendants will be permitted to work up a bill of costs for the prior New York action and to submit the bill to the Court. To the extent approved, those costs will serve as a setoff against whatever recovery plaintiff receives. Cf. Gainey, supra,

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[14](...continued)
that attorneys' fees were denied in the more relevant precedent, Yetter Homes v. Coastal Cabinet Works, 234 F. Supp. 568 (E.D.S.C. 1964). Compare Doc. 13, at 42 n.* with Doc. 10, at 38-39. The Court presently declines to attempt to resolve this question.

[15]See Doc. 20, at 28.

34 F.R.D. at 11 (discussing an earlier case in which a setoff was approved).

Defendants' motion pursuant to rule 41(d) will be denied except to the extent specified in the preceding paragraph.

II. Rule 12 Motion

A. Background

In 1961, Minas Y Petroleos del Ecuador ("Minas"), a wholly owned subsidiary of Norsul Oil and Mining, Ltd. ("Norsul"), obtained a concession contract from the government of Ecuador for the exploration, development, and marketing of petroleum and natural gas deposits in Oriente Province.[16] Minas agreed to pay royalty on each barrel of oil produced, to make substantial investments for development of the conces-

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[16]Oriente Province, the easternmost province in Ecuador, is mountainous in nature and about 300 miles from the shore.

sion area, and to construct a pipeline and other facilities. Subsequently, Minas realized that it could not fulfill the financial and exploration requirements of the 1961 concession contract. As a consequence, in 1963 Norsul entered into an agreement with plaintiff under which plaintiff acquired a fifty percent interest in Minas in exchange for providing technical assistance and funds to defray preliminary exploration and maintenance costs.

In 1965, with the subsequent approval of the government of Ecuador, Minas on behalf of plaintiff and Norsul entered into a written agreement with the Ecuadorian operating subsidiaries of defendants Texaco and Gulf, the predecessors of defendants Texaco Petroleum Co. ("Texaco Ecuador") and Ecuadorian Gulf Oil Co. ("Gulf Ecuador"). The subsidiaries were assigned the rights to

develop a portion comprising approximately fifteen percent of the concession area in sole exchange for the assignor ("Minas") reserving a two percent gross royalty interest in crude oil production from the assigned area.

Early in 1969, defendants publicly announced their first oil discovery in the concession area. Ensuing reports within trade circles indicated that the amount of reserves within the concession area were very substantial.

The information heretofore related does not appear to be seriously disputed by the parties. From this point onward, however, the parties' versions are at variance. For purposes of evaluation, the succeeding account is derived largely from the Complaint. Plaintiff claims defendants committed acts and omissions giving rise to three legal theories of recovery: (1) breach of contract; (2)

unjust enrichment; and (3) intentional infliction of economic distress. As related by plaintiff, the facts justifying legal recovery on these grounds are as follows.

Defendants are alleged to have starting in 1969 and continuing to the present "agreed upon, developed and implemented plans, schemes and a conspiracy to eliminate or impair plaintiff's gross royalty interest, to destroy plaintiff as a going concern, to remove plaintiff as a competitor in Ecuador and elsewhere and to reap whatever financial benefits would flow therefrom . . . ."[17] The alleged objective of defendants was either to reduce or eliminate the royalty interest or to enable the conversion by the Ecuadorian government of the royalty interest into

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[17]Doc. 1, at 8.

taxes which could be credited on United States income tax returns.[18]

Proceeding roughly in chronological order, plaintiff first avers defendants falsely and misleadingly claimed a discovery well was not located in the concession area and not subject to the two percent royalty.[19] This matter was resolved after Norsul instituted a declaratory judgment action in federal court in New York by stipulation that the well was within the assigned area and Minas and its successors and assigns were entitled to a two percent royalty.[20] Plaintiff claims the publicity surrounding the incident caused it harm in the financial market.

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[18]See Doc. 13, at 18.

[19]This claim allegedly was made knowingly and with the foreseeable effect of injuring plaintiff's business.

[20]Doc. 16, at D-1.

In 1971, plaintiff and Norsul each obtained an individual one percent royalty interest from Minas. Plaintiff avers that defendants subsequently, for the purpose of harassing and financially and physically wearing down plaintiff's and Norsul's resources, began to request documents purportedly to establish right and title to the gross royalty. Plaintiff asserts that providing the "unnecessary documents" and attending meetings caused harm and that defendants were at all times fully aware of the validity of the royalty.[21]

In 1972, a military government obtained power in Ecuador, replacing an elected civilian administration. Allegedly, at this point defendants falsely and maliciously began to publicly attack the original 1961 Minas conces-

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[21]Doc. 1, at 10.

sion agreement, terming it "piratical."[22] Later in 1972, defendants commenced royalty payments to the government of Ecuador based on a new "reference price" which was set pursuant to a Hydrocarbons Law established by Ecuador in October 1971. Plaintiff claims at that time it was entitled to receive its gross royalty payment for the third quarter of 1972, as well as an accounting statement, but that neither was received when due. Thereafter, a series of delays and extensions was allegedly forced upon plaintiff under "implied threat."[23] Meetings were held and further delays where requested with respect to subsequent payments. Some delays were granted, but in at least one case plaintiff asserts it agreed to no

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[22] Id. 11.

[23] Id. 12.

delay.[24] In early 1973, a new agreement was made, defendants allegedly having "extracted plaintiff's consent to the ... agreement and to repeated payment delays by economic duress."[25]

Allegedly, soon after the 1973 agreement, "substantially all of defendants' senior officials and employees charged with defendants' Ecuador affairs traveled to Quito, Ecuador to make further plans for the impairment of plaintiff's gross royalty interest and the destruction of said interest and therewith of plaintiff's business. During this period, defendants continued to fail and refuse to make any gross royalty payments to plaintiff."[26]

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[24] Id. 13.

[25] Id.

[26] Id. 15.

On February 26, 1973, plaintiff states it was advised by a Texaco official that gross royalty payments would be withheld until "further notice."[27] The ensuing publicity allegedly harmed plaintiff in the business community. Thereafter, on May 29, 1973, the Ecuadorian government issued a decree imposing a retroactive 86% withholding tax exclusively on plaintiff's and Minas' royalty interest. Plaintiff claims that it was harmed by defendants because even though this tax would have reduced the amount of its royalty interest after 1972, it was deprived of the carrying value of the money it would have received if defendants had paid the royalty properly. Plaintiff further declares its other investments in other countries were impaired due to the destruction in

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[27] Id.

financial credibility and capability defendant allegedly caused.

In August 1973, a contract was formed between the Ecuadorian government oil company ("CEPE") and defendants Texaco Ecuador and Gulf Ecuador. The contract granted CEPE the option to acquire up to twenty-five percent of these defendants' oil production rights in exchange for a negotiated consideration. The option was exercised by CEPE in June 1974. Despite demands by plaintiff, defendants since that time allegedly refuse to pay plaintiff twenty-five percent of gross royalties due or pay plaintiff a share of the funds derived from the sale to CEPE. Finally, plaintiff declares that subsequent to 1973, "defendants have threatened plaintiff that they intended not to make any further gross royalty payments nor to

furnish further accounting statements."[28]

Although the above is not complete, the account fairly reflects plaintiff's allegations. In sum, plaintiff urges the 1965 agreement was breached by failure and refusal to make timely payments, make full payments, deposit the payments in the proper place, and render proper accounting statements. The unjust enrichment claim is predicated on plaintiff's failure to receive a royalty or share of the monies garnered by defendants from the CEPE twenty-five percent acquisition. Finally, the theory of intentional infliction of economic distress is asserted as a catchall label for the alleged tortious acts of defendants relating to the supposed embarkation on an alleged plan to weaken or

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[28] Id. 23.

destroy plaintiff in order to reduce or eliminate the royalty burden.

B. Forum Non Conveniens

1. Procedure

Before endeavoring to elucidate the facts pertinent to defendants' forum non conveniens motion, the Court must first determine whether consideration of the parties' affidavits and appended copious exhibits may convert the motion into a summary judgment action pursuant to F.R.Civ.P. 56. The possibility of conversion was raised at oral argument and plaintiff responded "our opinion has been all along this is essentially a motion for summary judgment."[29]

To the extent a problem is posed, it results from the failure of defendants to delineate under which subsection of rule 12 this motion is brought.

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[29]Doc. 20, at 65.

See Mortensen v. First Federal Sav. & Loan Ass'n, 549 F.2d 884, 890 (3d Cir. 1977). Conversion to a summary judgment motion occurs when resolution of a rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted depends upon matters outside of the pleadings. See Moreland v. Western Pennsylvania Interscholastic Athletic League, No. 77-1576 (3d Cir. Feb. 27, 1978); 5 C. Wright & A. Miller, Federal Practice & Procedure § 1366 (1969). As noted by defendants, however, the present motion pertains to dismissal on jurisdiction or discretionary jurisdiction grounds.[30] Although not so labelled by defendants, the action apparently is brought pursuant to rules 12(b)(1) and/or (3). Defendants argues that in connection with this type

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[30] Id. 66.

of motion a court can evaluate factual matters without converting the motion to summary judgment, citing Land v. Dollar, 330 U.S. 731, 735 n.4 (1947); Exchange Nat'l Bank of Chicago v. Touche Ross & Co., 544 F.2d 1126, 1130-31 (2d Cir. 1976); and Alabama v. Woody, 473 F.2d 10, 12 (5th Cir. 1973).

The correctness of defendants' argument was recognized by the Third Circuit in an antitrust context in Mortensen, supra. Speaking of a rule 12(b)(1) motion which attacks jurisdiction in fact and not merely on the pleadings, Judge Hunter noted:

> Because at issue in a factual 12(b)(1) motion is the trial court's jurisdiction -- its very power to hear the case -- there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. In short, no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude

> the trial court from evaluating for itself the merits of jurisdictional claims.

549 F.2d at 891 (footnote omitted). Essentially the same holds true for a motion under rule 12(b)(3). C. Wright & A. Miller, supra, § 1352.[31] It is concluded to the extent the motion is predicated on forum non conveniens it should not be treated as a motion for summary judgment.

Finally, the manner of inquiry adopted by the district court is quite flexible. "As there is no statutory direction for procedure upon an issue of jurisdiction, the mode of its determination is left to the trial court." Gibbs v. Buck, 307 U.S. 66, 71-72 (1939).

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[31] See Vanity Fair Mills v. T. Eaton Co., 234 F.2d 633, 645 (2d Cir.), cert. denied, 352 U.S. 871 (1956). "[I]n the determination of a motion to dismiss for forum non conveniens, the court may consider affidavits submitted by the moving and opposing parties."

2. Merits

"A district court may in the interest of justice decline to pass upon the merits of a controversy and relegate the plaintiff to a more appropriate forum." Hoffman v. Goberman, 420 F.2d 423, 426 (3d Cir. 1970). "The principle of forum non conveniens is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute." Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507 (1947). The doctrine "involves the dismissal of a case because the forum chosen by the plaintiff is so completely inappropriate and inconvenient that it is better to stop the litigation in the place where brought and let it start all over again somewhere else." Norwood v. Kirkpatrick, 349 U.S. 29, 31 (1955), quoting with approval All States Freight v. Modarel-

li, 196 F.2d 1010 (3d Cir. 1952). "[U]nless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." Gilbert, supra, 330 U.S. at 508. "[W]here as here, the plaintiff elects to sue the defendant in the latter's district of residence, his choice should be disturbed only upon a strong showing that it is required by the balance of convenience." Daquila v. Schlosberg, 253 F.2d 888, 889 (D.C. Cir. 1958); see Annot., 10 ALR Fed. 352, 377 (1972).

"Each case turns on its own particular facts, but the ultimate inquiry is whether the retention of jurisdiction by the district court would fairly serve the convenience of the parties and the ends of justice." Hoffman, supra, 420 F.2d at 426 (footnote omitted). The classic statement of the criteria to be

considered in evaluating a forum non conveniens motion was articulated by Justice Jackson in Gilbert, supra, 330 U.S. at 508-509 (footnote omitted):

> An interest to be considered, and the one likely to be most pressed, is the private interest of the litigant. Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trail of a case easy, expeditious and inexpensive. There may also be questions as to the enforcibility [sic] of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial. . . .
>
> Factors of public interest also have place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs

> of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an approrpieateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.

Assuming without deciding that Ecuadorian law will govern at least the breach of contract claim, the record thus far compiled does not favor depriving plaintiff of its chosen forum. This conclusion particularly is compelled by the realization that plaintiff has ceded defendants the "home turf" advantage and that in light of the relative economic capabilities of the parties plaintiff can hardly be said to "vex," "harass,"

or "oppress" defendants by the bringing of this suit.[32]

Turning first to the Ecuadorian interest in adjudicating this suit, defendants assert: (1) Ecuador has a vital interest in management of its petroleum resources and the maintenance of a "single legal regime"; (2) a governmental minister in Ecuador has already construed the 1965 contract three times and a ruling in favor of plaintiff might result in caducity (premature termination of concession rights) for defendants; (3) the agreement was made in Ecuador, between Ecuadorian citizens, to be carried out in Ecuador; (4) Ecuador can act to secure compliance with its law; (5) numerous documents written in the Spanish language may be relevant to the action.

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[32]See Gilbert, supra, 330 U.S. at 508.

Upon evaluation, these averments are largely untenable. Plaintiff concedes a vital interest on Ecuadors' part in control of its natural resources; plaintiff rightly questions how that interest is impaired by judicial interpretation of a private royalty interest Ecuador allegedly already has recognized as valid. Further, plaintiff respresents it "is not challenging any rulings or decrees of the Government of Ecuador and is not attempting to resubmit any of these matter for further adjudication by

this Court."[33] Admitting arguendo the agreement here in question was made in Ecuador, this hardly constitutes a sufficient independent reason for dismissal, especially when the point applies only to breach of contract and not necessarily to the other theories of recovery alleged.

With respect to the asserted ability of Ecuador to secure compliance with its law, this too is subject to legitimate challenge. First is the matter of personal jurisdiction. Plaintiff states

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[33]Doc. 13, at 47.

As a matter of interest but not as a controlling factor, it is noted that although defendants presently claim all aspects of Ecuadorian oil production should be regulated in Ecuador, plaintiff has submitted an affidavit showing that defendants were not unwilling to bring suit in the United States in a matter involving oil rights in which an Ecuadorian government minister interceded. Doc. 14, at 5-6. See Ecuadorian Gulf Oil Co. v. Atlantic Richfield Co., 73 F.R.D. 99 (C.D. Cal. 1976).

by way of affidavit that three of the four defendants to this action might not be subject to judicial compulsion in Ecuador.[34] Thus, at a minimum, this Court would have to condition a dismissal upon defendants submitting to Ecuadorian jurisdiction.[35] But the record suggests that even if jurisdiction existed and plaintiff received a verdict in Ecuador, defendants perhaps could not be penalized effectively. Presumably, the only legal advice for enforcing ministerial government decisions in Ecuador is caducity, and Ecuador allegedly could not impose this remedy upon defendants because of its economic dependence upon them.[36]

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[34]Doc. 14, at 4.

[35]See Fitzgerald v. Texaco, Inc., 521 F.2d 448, 449 (2d Cir. 1975), cert. denied, 423 U.S. 1052 (1976).

[36]Doc. 14, at 4.

Finally, the recitation of various Spanish language documents appears largely misplaced. The relevance of numerous of the mentioned documents is dubious. Moreover, it has been resolved beyond peradventure that courts in this country poseess the capability to try cases dependent upon documents written in other languages and that such a factor is not sufficient independent cause for a forum non conveniens dismissal.[37]

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[37] See D'Angelo v. Petroleos Mexicanos, 398 F. Supp. 72, 85 (D. Del. 1975):

> The fact that the success or failure of plaintiff's case depends upon the law of Mexico does not, of itself, justify a dismissal. There may be difficulties in attempting to determine and apply foreign law but the rules of the foreign law and their interpretation are simply questions of fact and involve difficulties no different from those which the federal courts sometimes experience in attempting to determine the law of other state jurisdictions. Burt v. Isthmus Development Co., 218 F.2d 353, 357 (5th Cir. 1955), cert. denied, 349

(continued...)

Even if that were not generally the case, Spanish is hardly an obscure and abstruse language that would provide extreme difficulty in obtaining accurate translations.

When compared against potential ties to the United States, the asserted Ecuadorian interests fail to tip the balance in favor of a forum non conveniens ruling. Plaintiff asserts in an affidavit a whole series of contacts between this action and the United States.[38] The more salient ones include: (1) the alleged Ecuadorian propaganda campaign and acts of harassment against plaintiff were directed by

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[37](...continued)
U.S. 992, 75 S.Ct. 661, 99 L.Ed. 1254. The interpretation of the law of a foreign country is a task from which federal courts do not shrink. Lesser v. Chevalier, 138 F. Supp. 330 (S.D.N.Y. 1956).

[38]Doc. 14, at 6-7.

defendants in the United States; (2) difficulties with respect to documentation of royalty rights were resolved by negotiations and correspondence in the United States; (3) the payment for the twenty-five percent CEPE acquisition in oil production was made to defendants Gulf Ecuador and Texaco Ecuador in the United States. The Court is unwilling to conclude these ties alone outweigh the Ecuadorian interest; indeed, the conclusion must be they do not.

But when the public and private interests in assuring a fair trial are evalutated, the balance convincingly favors proceeding in the United States. First and foremost, it is not at all clear that Ecuador represents an acceptable alternate forum. "[A] prerequisite to dismissal under the doctrine of forum non conveniens is the existence of an alternative forum where plaintiff can

litigate his claims." Wan v. Avis Rent A Car System, Inc., No. 75-28 (D. Del. Jan. 20, 1976) (Memorandum Opinion) (footnote omitted). "[T]he action will not be dismissed unless a suitable alternative forum is available to the plaintiff." Restatement (Second) of Conflict of Laws § 84, Comment c (1971). "That there is an alternative forum that will take jurisdiction of the case and where plaintiff can get the relief he would get in the federal court must clearly appear before dismissal can be ordered." C. Wright, Law of Federal Courts 186 n.23 (1976) (citing cases). "Limitation upon or denial of recovery is in and of itself grounds for not dismissing on forum non coveniens grounds." Fitzgerald v. Texaco, Inc., supra, 521 F.2d at 458 (Oakes, J., dissenting).

That the Third Circuit Court of Appeals believes the existence of a suitable alternative forum to be critical is boldly demonstrated in this passage from Mobil Tankers Co. v. Mene Grande Oil Co., 363 F.2d 611, 614 (3d. Cir.), cert. denied, 385 U.S. 945 (1966):

> "The issue of convenience aside, the more important question is whether the relinquishment of jurisdiction would best serve the ends of justice. The court below seemed to think that it would, but with this we cannot agree. There is no evidence in the record that the retention of jurisdiction would seriously prejudice [defendant]. However, the relinquishment of jurisdiction could result in serious detriment to [plaintiff's] causes of action. It would relegate the libellants to a foreign forum [Venezuela] in which the procedural remedies are far less conducive to the fair administration of justice than those available under our admiralty rules. The mode of trial, the lack of adequate pre-trial procedures, and the limitation on the manner in which expert testimony may be offered do not comport

> with our concepts of fairness."

Thus the Third Circuit has apparently endorsed the concept that not only must an alternate forum exist, and not only must that forum provide relief for the actions alleged to violate United States law, but the alternate forum must also provide comparable procedural protections to those in the United States.[39] This Court needs not hold as

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[39]The Mobil Tankers language appears somewhat broader than the approach subsequently taken by the Third Circuit in Hoffman v. Goberman, supra, 420 F.2d at 428:

> The plaintiff also contends that an action amy not be dismissed unless the defendant proves, and the court expressly finds, that there is a second forum available to the plaintiff in which he may obtain substantially identical relief. He argues that the Netherlands Antilles is not such a forum since its courts are not empowered to entertain a suit on a contract dispute between him and the defendant or to grant him the equitable relief to which he asserts he is entitled. We need not decide this question,

(continued...)

much. Sufficient doubt arises with respect to the existence of an alternative forum and the availability of relief for the alleged actions to justify a decision not to dismiss the case without resort to a comparison of alternate procedural safeguards.[40]

Plaintiff has represented by affidavit that Ecuador is presently controlled by a military government which has "assumed the power of the executive and legislative branches and rules by fiat," "has specifically retained the right to veto or intervene in any judi-

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[39](...continued)
however, but the doubt which it raises as to the existence of an adequate second forum adds weight to the plaintiff's argument against dismissal here.

In the Hoffman decision, the Third Circuit twice cited Mobil Tankers, expressing no disapproval of the case.

[40]It is noted plaintiff represents that procedural protections under Ecuadorian law are scant. Doc. 14, at 3.

cial matter which the Military Government deems to involve matters of national concern," and "has absolute power over all branches of government."[41] The status and pwoers of the judiciary are thus allegedly "uncertain."[42]

Assuming a decision on the merits of this dispute could be obtained in Ecuador, and further assuming this Court would condition any dismissal for forum non conveniens on the willingness of all defendants to concede Ecuadorian jurisdiction, there still is no assurance that the Ecuadorian justice system would consent to accepting jurisdiction over defendants it otherwise might not be

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[41]Doc. 14, at 2.

[42]Id. 3. Plaintiff further argues the government minister who might hear the case is not competent to hear private party disputes over private contracts and defendants' propaganda campaigns have removed any chance for a fair hearing. Doc. 13, at 49.

able to reach because of jurisdictional limitations in Ecuadorian law. As stated by the Supreme Court in Gilbert, supra, 330 U.S. at 506-07: "In all cases in which the doctrine of forum non conveniens comes into play, it presupposes at least two forums in which the defendant is amenable to process. . . ." As previously rehearsed, Ecuador might not be able to obtain jurisdiction over three of the four defendants.[43]

Also, plaintiff has asserted in its brief that sending "officers, witnesses,

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[43]Plaintiff represented in oral argument: "The Courts of Law in Ecuador specifically provide that they do not accept jurisdiction over foreign aliens in disputes which relate to the controversy which would have existed here . . . . There would be no possibility of Ecuador taking jurisdiction of this dispute." Doc. 20, at 75. Defendants countered that plaintiff did go to a government minister and present its position on this matter. Id. That allowing a presentation of a position before a governmental official is equivalent to taking jurisdiction over foreign defendants is unlikely.

experts and documentary evidence to Ecuador would create a substantial hardship."[44] Given the aforementioed relative economic positions of plaintiff and defendants, the Court credits the representation that plaintiff conceivably could be seriously harmed by mere burden of travel and trial preparation.

Finally, even if an Ecuadorian tribunal will hear the case, jurisdiction is had over all defendants, and plaintiff financially is able to proceed in Ecuador, it appears that no generally codified Ecuadorian legal remedy exists for unjust enrichment or the tort claims asserted here.[45] Thus, this case may

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[44]Doc. 13, at 51.

[45]This statement does not by implication indicate that "intentional infliction of economic distress" is a recognized claim in the United States, but merely that a remedy probably exists here for some of the alleged tortious violations placed under that heading. Defendants claim any such tort action is

(continued...)

not simply be one in which a lesser remedy could be obtained elsewhere than in the United States, but rather one in which no remedy could be obtained for two of three legal theories advanced.[46]

Practical considerations also dictate United States jurisdiction. Defendants' offices and officers are located in the United States, as may be relevant records. No problem exists with enforceability of any judgment that might be obtained against defendants in this

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[45](...continued)
barred by the statute of limitations. Doc. 18, at 5. But that issue is not properly before the Court; defendants have made no motion to dismiss for failure to bring suit within the limitations period. See Doc. 20, at 13. The Court is not inclined in the present procedural setting to take judicial notice of a statute of limitations as suggested by defendants, id. 18, when the Complaint in this case asserts that the alleged conspiracy underlying the alleged tortious acts "continues to this day." Doc. 1, at 24.

[46]See Doc. 14, at 3.

country. Defendants cite no docket problems of the District of Delaware or other administrative reasons to justify application of the forum non conveniens doctrine.

Defendants assert the circumstances of this case are remarkably similar to those in Vanity Fair Mills, Inc., v. T. Eaton Co., 234 F.2d 633 (2d Cir.), cert. denied, 352 U.S. 871 (1956), where a dismissal based on forum non conveniens was granted. But Vanity Mills apparently involved only one basic theory of recovery, not three. In Vanity Fair, the Canadian justice system had already rendered certain decisions concerning the trademarks in issue, and the Exchequer Court possessed exclusive jurisdiction to resolve the action in question. 234 F.2d at 646. That plaintiff could obtain a fair adjudication in Canada did not appear to be a subject of serious

dispute; the Second Circuit examined the relevant Canadian law to assure existence of a legal remedy. The circuit court stated: "Were this merely a transitory tort action in which disputed facts would be litigated as conveniently here as in Canada, we would think the jurisdiction of the district court should be exercised. But we do not think it the province of United States district courts to determine the validity of trade-marks which officials of foreign countries have seen fit to grant." 234 F.2d at 647. In the case at bar, there is (1) an alleged connected tort action that can be litigated here; and (2) the absence of a clear issue under a developed body of foreign law hinging upon a previous determination under that foreign law. For these reasons, Vanity Mills is not dispositive of this action.

Defendants' other references to various scattered precedents also are not persuasive. Initially, it is emphasized forum non conveniens is a discretionary doctrine varying in application from case to case depending on the facts. For each case cited by defendants in which forum non conveniens was found, plaintiff offers an opposing precedent.[47] Defendants refer to De Sairigne v. Gould, 83 F. Supp. 270 (S.D.N.Y. 1949), aff'd per curiam, 177 F.2d 515 (2d Cir.), cert. denied, 339 U.S. 912 (1950). The district court in that instance merely determined that a federal court does not have to allow an alien to sue in the United States; no averment was made that a federal judge cannot permit suit by an alien. Moreover, plaintiff in Gould had lesser ties

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[47] Compare Doc. 10, at 50-52 with Doc. 13, at 61-63.

to the United States than the present plaintiff which allegedly maintains a New York office and trades common shares in the United States.[48] All witnesses in Gould other than the parties resided in France. 83 F. Supp. at 272. Finally, plaintiff in Gould could obtain jurisdiction over defendant equally as well in France as in the United States. 83 F. Supp. at 273.[49]

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[48]Doc. 1, at 2.

[49]Defendants' other citations also are distinguishable. In Fitzgerald v. Westland Marine Corporation, 369 F.2d 499 (2d Cir. 1966), the district court did note the potential need to interpret both Japanese and Canadian law. But Westland involved three defendant corporations -- one American, one Japanese, and one Canadian. Serious and perhaps insurmountable difficulties existed with respect to ease of access to sources of proof and the availability of compulsory process. Most if not all potential witnesses resided in Japan.

The citation to Domingo v. States Marine Lines, 340 F. Supp. 811, 816 (S.D.N.Y. 1972), is unhelpful. Defendants make no showing of administrative inconvenience comparable to that in Domingo and the potential connections to

(continued...)

Similarly unavailing is defendants' argument that "where the parties to a contract have stipulated to the adjudication of disputes in a particular foreign forum, that stipulation will be honored in the context of a forum non-conveniens motion."[50] Defendants' affidavits fail to disclose that the parties to this litigation have stipulated to any such thing; the reference made to a choice of forum clause pertains to concessionaires and defendants admitted at oral argument this lawsuit is not a

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[49](...continued)
the United States are stronger here than in that case. The court in Domingo found clear jurisdiction over defendant in the relevant foreign nation and certain enforceability of judgment. Moreover, the Domingo court noted that the Delaware state courts had denied a forum non conveniens motion in an apparently related case instituted there. 340 F. Supp. at 817. See States Marine Lines v. Domingo, 253 A.2d 78 (Del. Super. 1969), aff'd, 269 A.2d 223 (Del. Sup. 1970).

[50]Doc. 10, at 52.

disagreement among concessionaires.[51] Additionally, if a choice of forum clause does exist, albeit not in clearly defined terms the Court might well have to determine whether it is reasonable under all of the circumstances surrounding this action. In the lead case cited by defendants on this issue, The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972), the Supreme Court indicated such a clause could be disregarded if shown to be unreasonable. 407 U.S. at 10.[52]

Remaining is only defendants' assertion that principles of comity require this action to be litigated in Ecuador. To the extent United States jurisdiction "is fraught with possibilities of discord and conflict with the

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[51]Doc. 20, at 10. Thus the references in Doc. 9, at 5 are not persuasive on this point.

[52]See Restatement (Second) of Conflict of Laws § 80 (1971).

authorities of another country," Vanity Mills, supra, 234 F.2d at 647, and thus the appropriateness of this forum is called into doubt, the Court is unable to perceive how United States resolution of the claims here advanced causes any especial concern to the government of Ecuador. The Court perceives no vital national concerns in the private contractual royalty agreement allegedly at issue here; the unjust enrichment and tort claims may be even less consequential to Ecuador. All defendants are United States corporations; a United States court can enforce its judgment and achieve compliance. Thus, to the extent the criteria in Restatement (Second) of Foreign Relations Law of the United States § 40 (1965) are relevant, they do not tip the forum non conveniens balance in favor of defendants.

In sum, because the public interests of the United States and the private United States interests of the litigants far outweigh the Ecuadorian interest in this litigation, the Court will not dismiss this suit under the doctrine of forum non conveniens.

C. Act of State

The preeminent explication of the act of state doctrine in American law is in Underhill v. Hernandez, 168 U.S. 250, 252 (1897): "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sove-

reign powers as between themselves."[53] Although the principle is compelled by neither international law nor the Constitution,[54] it maintains vitality because of the deference of the judiciary to the other branches in matters concerning foreign affairs.[55] Act of state's primary application is to cases involving expropriation of foreign property owned by Americans.[56] The doctrine does not apply "to acts committed by foreign sovereigns in the course of their purely commercial operations."[57]

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[53]See Restatement (Second) of Foreign Relations Law of the United States § § 41-43 (1965).

[54]Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427 (1964).

[55]Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682, 697 (1976).

[56]E.g., First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972); Sabbatino, supra.

[57]Alfred Dunhill, supra, 425 U.S. at 706.

Defendants contend this doctrine is controlling in the matter sub judice, referring to Ecuadorian governmental rulings, decrees, and issuances and asserting that the Ecuadorian "Minister of Natural and Energy Resources has already authoritatively construed the 1965 Conract adversely to plaintiff."[58] Plaintiff responds: "Here, the complaint does not challenge the validity, application or purpose of any law of Ecuador. Plaintiff does not allege any injury was caused by government action, including the 86% tax and the 25% acquisition by CEPE. The complaint does not even charge the defendants with instigating government action."[59]

To the extent defendants urge the doctrine tips the forum non conveniens

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[58]Doc. 18, at 27.

[59]Doc. 13, at 72.

balance in favor of Ecuador, the Court believes the strong United States interests in this litigation delineated in the preceding segment of this Opinion are by no means outweighed. To the extent act of state constitutes a separate basis for dismissal, plaintiff challenges not the various decrees and rulings defendants have specified but rather their effects. See D'Angelo v. Petroleos Mexicanos, 398 F. Supp. 72, 77 (D. Del. 1975); 422 F. Supp. 1280 (D. Del. 1976). With the question in substantial and presently unresolvable dispute, the motion for summary judg-

ment[60] on the basis of the doctrine of act of state[61] will be denied.

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[60]Unlike forum non conveniens, act of state is not a jurisdictional defense. Where the act of state doctrine is implicated, "rather than declining jurisdiction, a court is supposed to exercise its jurisdiction and decide a case on the merits, after according the foreign act an irrebuttable presumption of legality. See, e.g., Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 471-72 (1964)." Zweibon v. Mitchell, 516 F.2d 594, 620 n.68 (D.C. Cir. 1975), cert. denied, 425 U.S. 944 (1976). Because act of state is not jurisdictional, the motion to dismiss on this ground must be considered to have been made on the basis of F.R.Civ.P. 12(b)(6). Consideration of the affidavits relevant to this issue, compare Doc. 9 with Doc. 15, converts this part of defendants' motion to one for summary judgment pursuant to F.R.Civ.P. 56.

[61]Defendants have also made reference to the doctrine of foreign governmental compulsion. Foreign governmental compulsion is related to act of state. The essence of the compulsion defense is that an act performed within a foreign country under the direct mandate of a foreign authority represents the de facto action of the sovereignty. Accordingly, the action is protected by the doctrines of act of state and sovereign immunity. See Graziano, Jr., Foreign Government Compulsion as a Defense in the United States Antitrust Law, 7 Va. J. Int'l L. 100 (1967); Note,

(continued...)

D. Involvement of Gulf and Texaco

Defendants argue that the Complaint does not allege a breach of contract

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[61](...continued)
Development of the Defense of Sovereign Compulsion, 69 Mich.L.Rev. 888 (1971). The doctrine first became law in the United States within this District in Interamerican Refining Corp. v. Texaco, Maracaibo, Inc., 307 F. Supp. 1291 (D. Del. 1970), in which it was held "a showing of bona fide compulsion by a foreign government immunizes an otherwise illegal boycott." 307 F. Supp. at 1297 n.14. The justification for the foreign governmental compulsion by the sovereignty, not the party manipulated.

A ruling independent of act of state is unnecessary with respect to the compulsion defense. Plaintiff stated in its brief: "In reality the government fo Ecuador did not compel the defendants to do any of the acts about which plaintiff is complaining." Doc. 13, at 68. The Court takes this to mean that to the extent defendants aver they were compelled to do certain things by the Ecuadorian government, those acts are not the ones about which plaintiff complains. Thus, as with act of state, the compulsion defense is in substantial unresolvable dispute at this time, precluding a present judgment in defendants' favor.

claim against Gulf and Texaco but only against their subsidiaries, so that the Complaint should be dismissed with respect to the parent corporations. The Complaint, which "should not be dismissed for insufficiency unless it appears to a certainty that the plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim," Scott v. Plante, 532 F.2d 939, 945 (3d Cir. 1976); Thomas v. Brierley, 481 F.2d 660 (3d Cir. 1973) (per curiam), alleges that "defendants Texaco and Gulf have at all pertinent times acted on behalf of Texaco Ecuador and Gulf Ecuador," "at all times have so conducted themselves as to assert complete dominion and control and management over [their subsidiaries]," "to assume on behalf of themselves the benefit of rights and obligations accruing to [the subsidiaries]," and indeed the

subsidiaries "have been and are mere alter egos of defendants Texaco and Gulf, respectively, and have been so treated by Texaco and Gulf."[62] It further is alleged that various meetings and negotiations with respect to contractual payments took place between plaintiff and the parent corporations.[63]

The Court has scant difficulty in denying the motion to dismiss. Whether the matter is analyzed in terms of agency and apparent authority to bind a principal, William B. Tanner Co., Inc. v. Wioo, Inc., 528 F.2d 262 (3d Cir. 1975); Reading Co. v. Dredge Delaware Valley, 468 F.2d 1161 (3d Cir. 1972), or instrumentality theory in which acts of a subsidiary are charged to a parent, Trent v. Atlantic City Electric Co., 334

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[62]Doc. 1, at 20.

[63]Id. 10-13.

F.2d 847 (3d Cir. 1964), the Complaint is sufficient to withstand facial attack.[64] Any challenge to the veracity of the facts alleged is not the proper subject of a rule 12 motion.

E. Conclusion

The rule 12 motion to dismiss for forum non conveniens and the lack of involvement of defendant parent corporations Gulf and Texaco will be denied. Treating the rule 12 motion as a rule 56 motion for summary judgment with respect to act of state, the motion for summary judgment will be denied.

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[64]Thus the Court finds it unnecessary to evalutate plaintiff's affidavit on this point. See Doc. 15, at 23-26.

Excerpts from Plaintiff's Petition for Rehearing

PETITION FOR REHEARING IN BANC

Preliminary Statement

Appellant respectfully petitions this Court for a rehearing in banc. The judgment and opinion were filed March 30, 1988. The petition relates solely to the panel's disposition of Appellant's unjust enrichment claim. It is based upon:

(a) The panel's incorrect statement of Ecuadorian legal principles governing recovery for unjust enrichment;

(b) The panel's incorrect statement of Ecuadorian laws defining petroleum exploitation rights; and

(c) The panel's failure to acknowledge and enforce controlling

Ecuadorian legislation which declared as a matter of law that CEPE's payments included the consortium's contractual exploitation rights as well as their assets.

* * *

Counsel's Statement
Requesting In Banc Consideration

I express a belief, based upon a reasoned and studied professional judgment, that the panel's opinion is contrary to the decisions of this Court and the Supreme Court of the United States, and that consideration by the full Court is necessary to secure and maintain uniformity of decisions in this Court; to wit, the panel's decision is contrary to the decision of this Court in Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979) and to the decisions of the United States Supreme Court in, among other cases, Banco Na-

cional de Cuba v. Sabbatino, 376 U.S. 398 (1964). Specifically, this appeal involves a question of exceptional importance, to wit, whether the panel's opinion, (a) reached conclusions inconsistent with unambiguous relevant laws and other state acts of Ecuador; and (b) insofar as it relied for such conclusions upon an inquiry into the motivations of Ecuador's sovereign acts, was inconsistent with the act of state doctrine.

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Excerpts from Ecuador's
1937 Petroleum Law

E C U A D O R

Petroleum Law

No. 70

of

1937

October, 1937

No. 70

I, Federico Paez, Supreme Head of the State,

Whereas, it is necessary to harmonize the mining and petroleum laws of the Country, and make the provisions of the special laws agree with those established by the General Mining Law;

Pursuant to the supreme powers with which I am vested,

Herewith decree the following:

PETROLEUM LAW

CHAPTER I - Property of the State

Article I

The following constitute property under the direct ownership of the State subject to the provisions of this Law:

a) Natural pools, sources and deposits of petroleum;

b) The gaseous hydrocarbons contained in the subsoil or which

escape from the surface of the earth;

c) The natural deposits of ozokerite and asphalt, and any mixture of hydrocarbons of the different groups which owe their origin to natural agents.

Article 2

The direct ownership by the State of the substances enumerated in the preceding Article is inalienable and imprescriptible; therefore, the rights granted pursuant to the present Law shall in no case establish absolute permanent ownership.

* * *

Article 7

The concessions to pools, deposits, mixtures and substances referred to in

Article I of the present Law are divided into:

a) Concessions by contract; and

b) Concessions by denouncement.

* * *

CHAPTER III - Concessions By Contract

Article 11

Any natural or juridical person may submit offers for obtaining a concession by contract to explore and exploit the petroleum of national ownership.

Article 12

Persons interested in obtaining contracts of this type must submit an application to the Ministro-Juez de Minas (Chief Authority over Mines) setting forth the following:

a) The name and nationality of the applicant;

b) A schematic map of the site or locality in which the pools,

deposits or substances claimed are located, with a clear and precise description of the area applied for and its boundaries;

c) A statement that there are indications of the possible existence of such pools, substances or deposits;

d) A promise to pay the guarantee required by law, the amount of which shall be deposited by it with the Central Bank of Ecuador to the order of the Government immediately after the contract has been signed or within the period of time established in the contract.

* * *

Article 18

In any concession by contract, there shall be expressly set forth the obligations and rights of the parties in a form similar to that which is established for mining concessions by contract by Article 67 and 68 of the General Mining Law, as well as all other rights and obligations which are deemed advisable.

The provisions of Article 71, 74 and 75 of the General Mining Law shall expressly apply in the case of petroleum concession contracts.

CHAPTER IV - Concessions By Denouncement

Article 19

Petroleum concessions by denouncement shall be granted for the period of time and extension thereof established in the last part of the first and second

paragraphs of Article 5 of the present Law, the exploration period and its extension being those specified in the third and fourth paragraphs of said Article at its end.

* * *

CHAPTER VI - Surface Fees, License Fees, Royalties and Taxes

Article 24

Concessions by contract shall pay each year, by March 31st of each year, during the periods of exploration and exploitation a surface charge of 20 centavos per hectare of the national lands contracted for the first two years; 40 centavos for the third year; 80 centavos for the fourth year and 1 sucre from the fifth year onward and until termination of the contract and its extension, if any.

* * *

Article 25

Concessions by denouncement shall pay, during the period granted them by this law both for exploration and for exploitation, an annual license fee of 30 sucres for each petroleum field, which amount shall be deposited by March 31st of each year.

Excerpts from Ecuador's
1971 Hydrocarbons Law

DECREE No. 1459

José María Velasco Ibarra, President of the Republic,

In virtue of the faculties that have been vested in him, issues the following:

HYDROCARBONS LAW

CHAPTER I

Fundamental Provisions

Article 1

The deposits of hydrocarbons and accompanying substances, in whatever physical state, located in the national territory, including the areas covered by territorial sea water, belong to the inalienable and imprescriptible patrimony of the State.

Article 2

The State shall explore and exploit the aforementioned deposits, set down in the preceding paragraph, in a direct manner through the Ecuadorian State Petroleum Corporation (CEPE), which will do so by itself or by executing association contracts, or service contracts with national or foreign companies, or by establishing mixed economy companies, that is, companies with a State participation.

* * *

Article 11

In the General Bureau of Hydrocarbons there will be kept a Hydrocarbons Register, which must contain the following data:

a) The deeds of constitution, extension or dissolution of the oil companies having Ecuadorian nationali-

ty;

b) The legal instruments of domicile in Ecuador of foreign oil companies;

c) The oil contracts executed by the Government or by CEPE;

d) The partial or total transfer of the rights established in the aforementioned contracts;

e) The instruments which accredit the legal representation of the oil companies; and

f) Declarations of extinction of contracts.

In order that Ecuadorian nationality companies or foreign domiciled companies are registered in this Registry, the provisions of the Law herein, of the Companies Law, the Trade Law and other pertinent legal provisions must be complied with.

Upon effecting registration, a certified copy of the public deeds or registration of same shall be filed.

The Ministry when it so deems advisable may order the filing of any document having reference to the legal situation of the contracting companies.

CHAPTER III

Contractual Forms

Article 12

Association contracts are those in which CEPE contributes its rights on areas, deposits, hydrocarbons and other rights which belong to its patrimony, and wherein the associate enterprise undertakes the commitment of effecting the investments agreed upon by the contracting parties.

In case of abandonment or total devolution of areas due to improductivi-

ty, CEPE shall not owe anything to the associate enterprise and the association contract relationship shall be considered extinct.

Article 13

In association contracts, the participation scale of each one of the parties, on production results, shall be agreed upon.

If the associated Company effects investments or spends more than the minimum amounts stipulated, the participation scale shall not be altered with regard to production results which has been set down in the association contract.

Article 14

The following items shall be stipulated in association contracts, at the very least:

a) The directive and administration organisms;

b) The time term of duration of the contract;

c) The minimum investment and work obligations;

d) Royalties, bonuses, surface fees, compensation works and other similar obligations;

e) The guarantees to be supplied by the associated Company in order to ensure fulfillment of its obligations;

f) The surface area and the manner of selecting exploitation areas;

g) The rights, duties and responsibilities of the operator;

h) The relations of the associated parties during the production phase; and

i) The manner, time terms and other conditions related to amortization.

Article 15

Services contracts are those in which natural or juridical persons, national or foreign, undertake to carry out on behalf of CEPE or by request of CEPE a specific work, contributing capital, equipment and machinery required for the development of the work.

CEPE may execute these services contract, under the conditions established for association contracts, insofar as applicable, for exploration and exploitation of deposits, refining, industrialization, transport and marketing of hydrocarbons.

Payment of services shall be made in accordance with the agreement of the contracting parties in the manner they deem advisable. In exploration and

exploitation contracts, hydrocarbons extracted shall be the property of CEPE, which may pay for the services rendered with a percentage of the gross production.

Article 16

Mixed economy companies organized by CEPE for the purposes provided for in Articles 2 and 3 above, shall be subject to the provisions of the Companies Law and other applicable laws with regard to their incorporation and operation. The incorporation contract shall contain provisions on the matters mentioned in Article 14 above.

* * *

CHAPTER IV

Crude Oil and Natural Gas

Article 30

Contracts authorize only the exploitation of crude oil; therefore, contractors or associated companies only have the right to the crude oil corresponding to them under such contracts.

For supplying the refining and industrial plants established in the country, the Ministry may require from the contractors or associated parties, whenever it may consider convenient, to furnish a uniform percentage of the crude oil belonging to them and make among them any financial compensations as it may deem necessary, so that such plants be supplied with the crude oil that may be the most adequate by reason of its quality and location.

The State shall authorize contractors or associated parties to export their oil once they have met the industrial and refining needs in the country and provided they comply with the requirements established by law.

Excerpts from Decree 925

CHAPTER I

PARTIES, PURPOSE, AREA AND DURATION OF THE CONTRACT

CLAUSE 1. Contracting Parties

1.1 The Government of Ecuador, represented by the Minister of Natural and Energy Resources, on the one hand, and on the other hand TEXACO PETROLEUM COMPANY and ECUADORIAN GULF OIL COMPANY, which shall hereinafter be referred to respectively as "THE GOVERNMENT" and "THE CONTRACTORS", agree to execute the present contract for the exploration and exploitation of hydrocarbons. The rights and obligations of the two contracting companies are undivided and shared equally, and consequently they are jointly and severally responsible to the Government for all obligations derived from the present contract.

CLAUSE 2. Object of the Contract

2.1 The object of this contract is the exploration of the contracted area and the exploitation of the crude oil and free gas which exist therein. This contract only authorizes the contractors to carry out, under exclusive right, the exploration of the contracted area and the exploitation of the crude oil and the free gas that exist in the said area, and therefore the contractors have the right to dispose only of the crude oil and free gas corresponding to them according to this contract.

2.2 Natural gas obtained in the exploitation of petroleum deposits, superficial asphalt deposits, sands impregnated with hydrocarbons and substances associated therewith are the exclusive property of the State and the use thereof shall be governed by the

regulations established for each case in the Hydrocarbons Law.

2.3 The activities of the contractors include: the production, storage, transport, supply for national consumption, commercialization and export of the hydrocarbons.

* * *

CHAPTER X

SPECIAL PROVISIONS RELATED TO THE CONTRACT

CLAUSE 52. Option for Participation of CEPE

52.1 CEPE may acquire up to 25% of the rights and actions conferred in the present contract and of the assets acquired by the contractors for the purposes of this agreement, upon payment of the value of the respective rights, assets and obligations in accordance with the terms and conditions to be determined by the parties. If CEPE

elects to exercise this right, it shall give notice within 90 days prior to June 6, 1977.

52.2 Before June 6, 1977, and in the event that CEPE does not exercise its option as of that date, the crude resulting from the said percentage shall belong to the contractors and may be exported by them. The percentage of crude remaining free if CEPE exercises its option only in part, shall also belong to the contractors and may be exported by them.

52.3 In the agreement to be made by the parties, the collaboration which the contractors can give for the sale in the international market of the petroleum corresponding to CEPE will be agreed upon.

TRANSLATION OF DECREE NO. 09
GENERAL GUILLERMO RODRIGUEZ LARA, PRESIDENT OF THE REPUBLIC:

CONSIDERING:

That Ecuador as a titular member of the Organization of Petroleum Exporting Countries (Opec) is obligated to harmonize the development of its petroleum industry with the resolutions adopted by that International Organ;

That the Organization of Petroleum Exporting Countries (Opec) in resolutions XVI.90; XXIV.135; XXV.139 established that the member countries must proceed immediately to take those steps necessary in order to make effective reasonable governmental participation in the property of those companies titleholders under any kind of contract;

That in clause 52.1 of the Contract authorized the 4th of August 1973 with Texaco Petroleum Company and Ecuadorian

Gulf Oil Company the option of CEPE is established to acquire, in 1977, 25% of the rights conferred in the said contract and in the assets acquired by the contractors for the purposes indicated in such agreement.

In use of the authority with which it is invested;

DECREES:

Article I. - Authorizes Capt. of the Navy of E.M., Gustavo Jarrin Ampudia, Minister of Natural and Energy Resources, to commence negotiations with the Texaco Petroleum and Ecuadorian Gulf Oil companies for the purpose of making effective during the course of the present year, the option of participation of Cepe in the 25% of the rights conferred in the contract entered into for the exploration and exploitation of hydrocarbons and in the assets acquired

by the contractors for purposes of the said contract.

Article 2.- This Decree has the character of a Special Decree; its provisions shall prevail over those contrary to it; it shall enter into effect from and after this date without prejudice to its publications in the Registro Oficial; and the Minister of Natural and Energy Resources is charged with its execution.

Given in the National Palace in Quito on the 2nd of January 1974.

(s) General Guillermo Rodriguez Lara
President of the Republic -

(s) Gustavo Jarrin Ampudia
Captain of the Navy of E.M.
Minister of Natural and Energy Resources

This is a copy, I certify it.

(s) Col. Carlos Aguirre Asanza
Secretary General of the Public
Administration.

(ACTA) MINUTES

According to the Supreme Decree No. 09 of January 2, 1974, published in the Official Paper No. 459 of January 10, 1974, that authorizes to the Minister of Natural Resources and Energy to initiate negotiations for the acquisition of 25% of the rights and assets of the Consortium Texaco-Gulf corresponding to the Exploitation and Exploration of Hydrocarbons Contract subscribed on August 6, 1973, and being of the Government's interest to make this option effective on June 6, 1974, it has been agreed between the Ministry of Natural Resources and Energy, CEPE and the Companies Texaco Petroleum Company and Ecuadorian Gulf Oil Company, in the following fundamental points of the negotiation:

1. The participation of CEPE will enter in force on 00.01 hour on June 6, 1974.

2. The terms and conditions of the purchase and sell will be subject to agreements between the parties, in a participation contract, that will have to be submitted to the approval of the National Government.

3. The rights and obligations of CEPE in the Contract will enter in force since the effective date mentioned in Numeral 1, and the price corresponding to the acquisition of such participation, will include:

3.1. Investments made during the period of pre-production as mentioned in Supreme Decree No. 1383 of December 14, 1973.

3.2. Investments made during the period of production until the

00:01 hour of June 6, 1974 and that includes the assets subject to amortization or depreciation according to such Decree.

3.3. The costs of equipment and materials in warehouse up to the date mentioned in the preceding numeral.

3.4. From the amounts corresponding to Numerals 3.1 and 3.2, will be deducted the amortizations and depreciations for the period ending on the 24 hours of June 5, 1974.

4. It is agreed the term of 90 days since June 6, 1974 to establish the exact amount that will be paid by CEPE for this acquisition. For the effect, an international well known corporation of public auditors will be contracted by the parties and will be paid by them pro rata.

5. CEPE becomes liable to make an advance of 25,000,000 dollars of the United States of America until June 30, 1974, as a part of the payment and to pay the remnant not later than September 6, 1974. Such remnant will be considered payable on such a date even if the exact amount mentioned in above numeral, has not been established yet up to September 6, 1974.

6. The System of the Trans-Ecuadorian Pipeline is part of this negotiation and for this reason CEPE will obtain 25% of the investments not amortized in such Pipeline System, according to a special agreement. The price to be paid in dollars of the United States of America for such participation will be equal to 25% of the total investment of the Pipeline as of June 6, 1974, less the amounts amortized or depreciated up to

that date plus the cost of equipment and materials for the pipeline in warehouse, up to the same date. This price will be considered payable not later than December 6, 1974.

7. CEPE will receive as of 00:01 hours, June 6, 1974, 25% of the gross production of oil obtained in the area of the Contract and may freely dispose of the remnant of the oil after the fulfillment of:

royalties

internal consumption, and,

other legal obligations

7.1. Corresponds to CEPE 25% of the storage capacity of crude oil in terminals and recollection centers. CEPE will take off oil in the Port of Balao, once it has released with oil that belongs to CEPE, 25% of the volumetric capaci-

ty of the recollection lines, death capacity of the storage tanks and Trans-Ecuadorian Pipeline.

7.2. Once CEPE decides to sell it, Texaco Petroleum Company and Ecuadorian Gulf Oil Company, will have first option to buy available crude from CEPE, produced in the contracted area, according to which is prescribed in present numeral, always under the terms and conditions established by CEPE to conform with national interests.

8. All the activities to be developed by the Joint Operation will be regulated by an Operation Agreement to which both parties subsribed. CEPE will participate in the Committee of Representatives of the parties and in Permanent Subcommittees of Petroleum Engineering, Accounting and Auditing, as well as

other Sub-committees which the parties might approve.

9. CEPE will designate, at their expense, a representative that will act as Assistant to the Operational Sub-Manager, as well as other personnel for technical job in the office and field. Moreover, will designate personnel to be trained in all phases of industry.

10. As of 00:01 hours, June 6, 1974, CEPE will contribute their portion of all the investments, operational expenses, obligations, royalties, sales of crude for internal consumption and other contractual expenses, as well as the obligations acquired by the contractors for the purposes of the Contract of Exploration and Exploitation, from August 6, 1973, all according to the procedures of invoicing and payments determined by the parties, and according to

the programmes and budgets approved by the Branch Ministry and the Operation Agreement to be subscribed.

11. To determine the amount of the investment according to what is mentioned in Clauses 3.1, 3.2, 3.3 and 6 of this Act, the value will be taken in dollars of the United States of America at the time at which each investment was made. Such value in dollars will be determined adding the following:

1. The value in Foreign currency paid for goods and services out of the country.
2. The amount of dollars sold to the Central Bank of Ecuador to acquire the sucres that have been invested in the country.
3. Investments made with sucres generated by local sales of crude which will be converted

to dollars at the official rate of exchange.

From this amount in dollars of the United States of America, will be deducted the corresponding amortization and depreciation, also in dollars of the United States of America. The amount so calculated will constitute the price CEPE will pay to Texaco and Gulf, in dollars, according to Clauses 5 and 6.

12. The parties have agreed on the points contained in this Act, with the clear understanding that given the nature of this Contract, there is not place for the payment of taxes, liens, contributions, rates, rights, and other charges in Ecuador, which are originated in or caused by the purchase-sale and transferencies subject to the agreements to be signed, as well as by the transactions, operations, and documents related

to such or with the payment of their price and deposit out of the country.

In witness of the Agreement of this present Act, the parties sign in the City of Quito, this 14th day of June of 1974.

Gustavo Jarrín Ampudia
Capitán de Navío de E.M.
Minister of Natural Resources

René Vargas Pazzos
Ternel.Ing. de E.M.
CEPE General Manager

Ing. Bernardo J. Díaz
Ecuadorian Gulf Oil Company

Michael A. Martínez
Texaco Petroleum Company

OFFICIAL BULLETIN (Quito, Monday July 8, 1974, Year III, Number 590)

DECREE No. 666

GENERAL GUILLERMO RODRIGUEZ LARA,

President of the Republic,

WHEREAS,

The acquisition of twenty five percent of the rights and shares of the Texaco Gulf Consortium constitutes a fundamental step of the petroleum policy of the National Government that benefits the most legitimate interests of the Ecuadorian people;

That by virtue of Supreme Decree number 09 of January 2, 1974, published in the Official Bulletin number 469 of January 10 of the same year, the Minister of Natural Resources and Energy is empowered to negotiate the purchase of twenty five percent of the rights and assets of the Texaco-Gulf Consortium;

That by virtue of the deed executed on June 14th, 1974, between the National Government, represented by the Minister of Natural Resources and Energy and the General Manager of CEPE and the Texaco-Gulf Consortium, it was agreed that one part of the purchase of that twenty five percent, equivalent to US$ 25,000,000 be paid up to June 30th, 1974;

That the growth of the international monetary reserve permits to endow CEPE with sufficient and timely resources to cover the commitment taken on by the Government;

That the utilization of the International Monetary Reserve can be retrieved by the proper (own) resources forthcoming from the additional petroleum exploitation obtained by the State through the Ecuadorian Petroleum Corporation (Cor-

poración Petrolera Ecuatoriana);

Using the powers that have been invested in him;

Decrees:

ARTICLE FIRST:- The sum of US$ 25,000,000.00 of the International Monetary Reserve is earmarked to effect payment of the purchase of twenty five percent of the rights and assets of the Texaco-Gulf Consortium.

ARTICLE SECOND:- The Central Bank of Ecuador is empowered to effect the payment referred to in the previous article, on account of the Corporacion Estatal Petrolera Ecuatoriana (Ecuadorian State Petroleum Corporation (CEPE)).

ARTICLE THIRD:- The Ecuadorian State Petroleum Corporation shall subscribe (sign) the guarantee title corresponding

to the utilization of the International Monetary Reserve, laid down by this Decree. This title will be in the denomination of dollars of the United States of America and will have the endorsement of the National Government.

ARTICLE FOURTH:- The Ministry of Finance is authorized to sign, in the name of the National Government, the corresponding endorsement guarantee of the title referred to in article third of this decree.

ARTICLE FIFTH:- The Ecuadorian State Petroleum Corporation shall sign, together with the Central Bank of Ecuador, a contract which will authorize to automatically retain from the income earned from exports of crude oil obtained from its participation in the Texaco-Gulf Consortium, besides the amounts corres-

ponding to the various taxes and burdens on the exported petroleum, the necessary sums for the gradual payment of the endorsement document.

ARTICLE SIXTH:- The Ministers of Finance and Public Credit and of Natural Resources and Energy are entrusted with the application of this Decree, which will enter into force from this date, without detriment of its publication in the Official Bulletin.

Issued in Quito, on June 28th, 1974.

signed: General Guillermo Rodríguez Lara, President of the Republic.
sgd: Jaime Moncayo García, Minister of Finances.- sgd: Commander Gustavo Jarrín Ampudia, Minister of Natural Resources.

This is a copy.- I so certify it.

sgd: Colonel Carlos Aguirre Asanza, General Secretary of Public Administration.

TRANSLATION

Republic of Ecuador
Ministry of Finance

No. 1030
General Guillermo Rodriguez Lara
President of the Republic

WHEREAS:

By means of Supreme Decree No. 09 of January 2, 1974, published in Official Registry No. 469 of January 10, 1974, the National Government decided to acquire through CEPE the equivalent of 25% of the rights and assets of the Texaco-Gulf consortium;

By means of Supreme Decree No. 666 of June 28, 1974, published in Official Registry No. 590 of July 8, 1974, $25,000,000.00 of International Monetary Fund monies were allocated for payment of part of the value of 25% of the rights and assets of the Texaco-Gulf consortium;

The National Government and the Texaco-Gulf consortium have agreed on the terms for acquisition of 25% of rights and assets of that consortium; and

By the authorities invested in me,

Decrees:

Art. 1 - By September 30, 1974, CEPE shall pay the Texaco-Gulf consortium the sum of $10 million, as the second advance for acquisition of an amount equivalent to 25% of the rights and assets of said consortium in Ecuador. The Banco Central is empowered to appropriate this sum from the International Monetary Reserve fund, according to the present Decree.

Art. 2 - Banco Central del Ecuador is empowered to apportion to CEPE the sums necessary for this institution to pay

the Texaco-Gulf consortium the total amount of 25% of its rights and assets, as soon as this quantity is determined officially by the National Government. This shall be done by utilizing the International Monetary Reserve fund in conformity with the provisions of this Decree. Payment of the difference between the total value which shall be determined by the Government and the payments already made, including the one provided for in this Decree shall be made by CEPE in three equal payments, the first by December 31, 1974; the second by March 31, 1975; and, the third, once the audit has been made and accepted by the National Government.

Art. 3 - To endorse the utilization of International Monetary Reserve funds in the transactions made by the Banco Central del Ecuador for the purposes of

this Decree, CEPE shall sign bonds in U.S. dollars which shall be guaranteed by the National Government.

The Minister of Finance, in name and representation of the National Government, is authorized to sign guarantees for the bonds referred to in this Article.

The quantities utilized from the International Monetary Reserve for the purposes of this Decree shall be amortized in a maximum of four years running from the date of the utilization and only 1% annual banking commission shall be paid. To comply with this provision, the Banco Central del Ecuador shall retain CEPE's income from crude exports forthcoming from its participation in the Texaco-Gulf consortium, in necessary quantities, by the same procedures applicable to the withholding of the taxes

and other deductions determined by the contract and by law, to which effect CEPE and the Banco Central del Ecuador shall sign an appropriate contract. The reimbursement of the first advance payment of $25,000,000 shall commence from December 31, 1974 on.

TRANSITORY PROVISION

CEPE shall sign the endorsement bond guaranteed by the Minister of Finance in conformity with the norms set forth in Article 3 of this Decree by October 31, 1974, in order to endorse the International Monetary Fund transaction for $25,000,000 made by the Banco Central del Ecuador in compliance with the provisions of Supreme Decree No. 666 of June 28, 1974, published in Official Registry No. 590 of July 8, 1974.

Final Article - The Ministers of Finance and Natural and Energy Resources shall

be charged with the enforcement of this Decree, which shall prevail over other legal provisions which oppose it and shall take effect from this date, without prejudice to its publication in the Official Registry.

Given in the National Palace in Quito, October 1, 1974.

/s/ Guillermo Rodriguez Lara

/s/ Engineer Pedro Aguayo Cubillo
Acting Minister of Finance

/s/ Captain Gustavo Jarrin Ampudia
Minister of Natural and Energy Resources

Resolution No. 12560

THE MINISTER OF NATURAL AND ENERGY RESOURCES CONSIDERING THAT:

WHEREAS, through Decree No. 1030 of October 1, 1974, published in the Official Gazette No. 656 of October 10 of the same year, it was resolved to carry out the studies and works that shall allow to determine the exact value of the 25% of the rights and interests belonging to the TEXACO-GULF Consortium, according to the contract signed for the exploration and exploitation of hydrocarbons and of the assets acquired by the contractors for the effects of said agreement, percentage in which the National Government has decided to participated through CEPE;

WHEREAS, it is necessary to carry out the audit that shall allow to determine the effective cost of operation per

barrel of oil produced by the CEPE-TEXACO-GULF Consortium, in order to accomplish Art.3o. of Decree No. 1393 of December 14, 1973, published in the Official Gazzette No. 460 of the 26th. of the same month and year;

WHEREAS, in order to carry out the audit to which reference is made in the above whereas clauses, it is necessary to select a highly especialized and internationally recognized auditing firm;

WHEREAS, the Advisory Commission of Petroleum Policy, has made the pre-selection of the firms which accomplished with the above mentioned requirements, to participate in the bid as established in the Official Letter No. 75-072-CA, of May 8, 1975;

WHEREAS, the Ministry of Natural and Energy Resources has prepared the

basis of the above mentioned bid; and,

IN USE of the faculties vested on him by Art. 88 of the Hydrocarbons Law,

RESOLVES:

Art. 1.- To approve the basis contained in the following terms:

BASIS "A"

ANTECEDENTS.- For the effects of having accomplished the dispositions of the Supreme Decree No. 09 of January 2, 1974, published in the Official Gazzette No. 169 of January 10, 1974, through which the Minister of Natural and Energy Resources is authorized to begin negotiations with Texaco Petroleum Company and Ecuadorian Gulf Oil Company in order to make effective the option of CEPE to participate in the 25% of the rights and interests conferred to such Companies according to the Exploration and Exploitation of Hydrocarbons Contract and also

to participate in the assets acquired by the same Companies for purposes of said contract; and according to the meeting held on June 14, 1974, which was attended by representatives of the Ministry of Natural and Energy Resources and CEPE, this Office desires to select and hire the services of a highly especialized and internationally recognized firm to carry out the audit to determine the total amount of the rights, interests and assets, including all warehouse existing materials and property goods of the Texaco-Gulf Consortium, which shall allow to determine the exact value of the 25% of the mentioned items. The selected firm that will be hired by the Ministry of Natural and Energy Resources will carry out the audit. For the knowledge of all concerned it is necessary to indicate that the auditing

of the exploration, pre=production and production periods, up to December 31, 1972, was already made by Arthur Young & Co., whose reports rest in this Ministry and will be at the disposal of the firm that is awarded the bid.

PURPOSE OF THE CONTRACT.- The auditing company which is awarded the bid will carry out the study and the works tending to determine the above mentioned amounts, under auditing rules normally acceptable having to carry out the audit of the rights and interests and of the assets of the companies which conform the Texaco-Gulf Consortium, excluding the cost of the transecuadorian pipeline Lago Agrio-Esmeraldas, under the following points:

a) Investments made in the production period from January 1, 1973 to 00:01 hours of June 6, 1974, which

contain the assets subject to amortization or depreciation, according to the rules contained in the Accounting Procedures of the Petroleum Companies for purposes of calculation of the production costs, communicated through Supreme Decree No. 1383 of December 14, 1974 (Art. 8).

b) Cost of equipment and materials in warehouse as for 00:01 hours of June 6, 1974.

c) THe investments made in the exploration, pre-production and production period up to December 31, 1972, have been already audited by Arthur Young & Co., and are not object of these basis, but their values shall be added to the amount determined in number a) of the present basis.

d) From the values of gross investment obtained according to numbers a) and c), will be deducted the proper amortizations and depreciations according to the rules of said Supreme Decree No. 1383 and to the pertinent dispositions of the Direction General of Revenues of the Ministry of Finance.

e) In order to establish the value of the assets, they will not only audit the invoices of the goods and services that make up the investment, but they will analize if their values correspond to the market prices in forces as for the acquisition dates. Charges for interests will not be accepted, neither will other financial costs, revaluations of any nature in such goods.

f) The investments amount will be determined in US Dollars and for this purpose the quotation of such currency as for the date when the investments were made will be used. This amount will be determined in the following way:

1.- The values paid with foreign currency for goods and services will be expressed in US Dollars.

2.- The amount of Dollars sold to the Central Bank of Ecuador to buy Sucres invested in the country.

3.- The investments made with Sucres generated from the local sales of crude, which will be converted to Dollars with the official exchange rate in force as for the date

of the different investments.

4.- The amortization and depreciation values will also be calculated in US Dollars to be deducted from the gross value of the assets.

g) The volume of investment shall be established in such a manner that the different types of investment identified in Decree No. 1383, are itemized.

PERIODS OF THE AUDIT.- The values mentioned in the numeral referring to the purpose of the contract, should be determined within the following periods:

- From January 1, 1973 to December 31, 1973
- From January 1, 1974 to 00:01 hours of June 6, 1974.

TERMS.- The Ministry of Natural and Energy Resources will receive the pre-

vious report of the contracted auditing within a term of 90 days and the final report within a term of 120 days, both counted from the date of the suscription of the contract.

PRICE.- The price of the contract will be fixed and established in currency of legal course in Ecuador and the auditing companies interested in carrying out the audit contained in this basis, will indicate the value and the manner of payment of their fees.

FIRM'S PERSONNEL.- The auditing firms should present an estimative of the personnel which will work carrying out the audit, indicating the especific work of each technician. The curriculum vitae of each technician should also be presented. The personnel chosen by the Auditing Firm for executing the project should be of the highest ethic and tech-

nical qualities and should have wide experience in the fields of auditing, and estimation of costs of the petroleum industry. The firm will not be able to change the initially pointed out personnel without the approval of the Ministry of Natural and Energy Resources. The earnings of the foreign personnel will be subject to the tax regime in force in Ecuador.

COUNTERPART'S PERSONNEL.- The Ministry of Natural and Energy Resources and CEPE will name the national technical personnel which will participate in the audit jointly with the firm that is awarded the contract. The remuneration of such personnel will be for the account of the Ministry of Natural and Energy Resources and CEPE.

GUARANTEE.- Every auditing firm which present their bid should present a bank

guarantee according to what is established by numeral i) of Art. 13 of the Biding Law (Ley de Licitaciones) in force, for the amount of the 2% of the total value of the bid.

REPORTS.- The reports should be presented in Spanish. In the preliminary and final reports should be especified the gross and net investment, itemized according to the different categories contemplated in the Supreme Decree No. 1383 of December 14, 1973. It will also present the justifying attachments of each one of these figures.

The auditing proceadures used by the Company shall be presented jointly with the preliminary report, as well as all the instructions and manuals used in carrying out the work.

RESERVE OF DATA CONTAINED IN THE AUDIT.- The Ministry of Natural and Energy Re-

sources reserves the property of data and information obtained with the audit, and also its utilization. The firm which is awarded the bid will not divulge under any circumstances the data and information of the study.

TERM FOR THE PRESENTATION OF THE BIDS.- The bid should be delivered in two numbered (1 and 2) envelopes and will contain the information requested by Art. 13 of the Biding Law. The presentation of bids should be made in the Office of the Undersecretary of Natural Resources within a term due at 16:00 hours of June 6, 1975.

BASIS "B"

ANTECEDENTS.- For effects of having accomplished the dispositions of Art.3o. of Supreme Decree No. 1393 of December 14, 1973, published in the Official Gazzette No. 460 of the same month and

year, the Ministry of Natural and Energy Resources desires to hire the services of a highly especialized and internationally recognized firm to have it execute the audit to determine the production cost per barrel of oil produced by the CEPE-TEXACO-GULF Consortium.

PURPOSE OF THE CONTRACT.- The Company that is awarded the contract will make the audit of the production costs per oil barrel, under normally acceptable rules and will determine if the TEXACO-GULF Consortium (later CEPE-TEXACO-GULF Consortium) has adjusted to the Accounting Procedures established by Supreme Decree No. 1383 of December 14, 1973, published in the Official Gazzette No. 457 of December 20 of the same year.

The production costs should be analized within the following items:

a) Amortization of investments;

b) Depreciation of fixed assets;

c) Direct production costs;

d) Indirect production costs indicating separately:

Administration expenses

Taxes, contributions and rates which are part of the production cost.

The auditing company will further analize that the disbursements carried out by the Consortium, be in relation to the market prices in force as for the date of acquisition of the goods and services necessary for the petroleum production.

TERMS.- The Ministry of Natural and Energy Resources will receive the preliminary report of the hired auditing in a term that can not be longer than 120 days, counted from the date of subscription of the present contract, and the

final report in a term that can not be longer than 150 days counted from said date of suscription.

PRICES.- The contract price will be expressed in currency with legal course in Ecuador and the auditing firm awarded the contract will show the manner on which the Ministry should pay the corresponding fees.

FIRM'S PERSONNEL.- The auditing firms should present an estimative of the personnel which will work carrying out the audit, indicating the especific work of each technician. The curriculum vitae of each technician should also be presented. The personnel chosen by the Auditing Firm for executing the project should be of the highest ethic and technical qualities and should have wide experience in the fields of auditing, and estimation of costs of the petroleum

industry. The firm will not be able to change teh initially pointed out personnel without the approval of the Ministry of Natural and Energy Resources. The earnings of the foreign personnel will be subject to the tax regime in force in Ecuador.

COUNTERPART'S PERSONNEL.- The Ministry of Natural and Energy Resources will designate the national technical personnel that will participate jointly with the firm awarded the contract, and should be in equal number of persons as the firm's personnel. The remunerations of this personnel will be for the account of the Ministry of Natural and Energy Resources.

GUARANTEE.- Every auditing firm which present their bid should present a bank guarantee according to what is established in numeral i) of Art. 13 of the

Biding Law (Ley de Licitaciones) in force, for the amount of the 2% of the total value of the bid.

LANGUAGE.- The reports should be presented in Spanish.

INSTRUCTIONS AND MANNUALS.- The firm awarded the contract should elaborate and have them available for the use of the Ministry of Natural and Energy Resources, the instructions and mannuals which are required to perform the audit, which can be used in later works of similar nature carried out by the Direction General of Hydrocarbons.

RESERVE OF DATA CONTAINED IN THE AUDIT.- The Ministry of Natural and Energy Resources reserves the property of data and information obtained with the audit, and also its utilization. The firm awarded the contract will deliver to the Ministry of Natural and Energy Resources

all the material used in the study described in the present basis. The firm which is awarded the bid will not divulge under any circumstances the data and information of the study.

TERMS FOR THE PRESENTATION OF THE BIDS.- The bids should be delivered in two numbered (1 and 2) envelopes and will contain the information requested by Art. 13 of the Biding Law. The presentation of bids should be made in the Office of the Undersecretary of Natural and Energy Resources within a term due at 16:00 hours of June 6, 1975.

Art. 2.- To invite the following companies: Arthur D. Little Inc., Deloitte Haskings and Sells, y Peat Marwick Mitchell and Co., which have been selected to bid for the establishment of the exact value of the 25% of the rights and interests of the Texaco-Gulf Consor-

tium and of the assets acquired by said Consortium for the effects of the suscribed contract for the exploration and exploitation of hydrocarbons, and also to carry out the audit in order to determine the effective cost of operation per barrel of oil produced by the CEPE-TEXACO-GULF Consortium.

Art. 3.- The receipt and classification of bids as well as the eventual award to the firm with the best bid will be analized by the following Commission:

The Undersecretary of Natural Resources who will be the president of the Commission;

The President of the Advisory Commission of Petroleum Policy;

The Director General of Hydrocarbons;

The Legal Counsel of the Ministry of Natural and Energy Resources;

A delegate of the Comptroller General of the Nation (Controlor General de la Nacion).

The same Commission will accord the terms of the contracts and will prepare said contracts.

Art. 4.- The Commission mentioned in the foregoing Article will carry out the bid, according to the procedures established on Basis "A" and "B" which are approved in the present Resolution.

Art. 5.- The Ministry of Natural and Energy Resources shall pay the corresponding amount of the audit which will determine the cost of operation per barrel produced by the Consortium, for the account of the budget item No. 1.321-0300-00-830.

The CEPE-TEXACO-GULF Consortium will pay the corresponding amount of the audit which will determine the exact

value of the 25% of the rights and interests of the TEXACO-GULF Consortium and of the assets acquired by the contractors according to the contract suscribed by said Consortium and the National Government, within the term that will be granted by the Ministry of Natural and Energy Resources.

Art. 6.- The works covered by the present Resolution may be awarded to a single firm or to several firms, under the criteria of the qualifier Commission.

Art. 7.- The Ministry of Natural and Energy Resources reserves the right to declare the bid without effect if doing so is convenient to the national interests.

BE COMMUNICATED.-

Given in Quito, May 22, 1975.

Luis Salazar Landeta
Admiral

Excerpts from the
1975 Audit Contract

T R A N S L A T I O N

Notary:

Please enter a legal instrument containing the following contract in your Registry of Public Deeds:

The ECUADORIAN STATE OIL CORPORATION, "CEPE", represented by its General Manager, Staff Colonel Luis Pineiros Rivera; TEXACO PETROLEUM COMPANY, represented by its agent Michael Anthony Martinez, and ECUADORIAN GULF OIL COMPANY, represented by its agent Lawrence Dean Perry; on the one hand, hereafter to be called "THE COMPANIES", and on the other hand, the firm of "PEAT, MARWICK & MITCHELL & CO." (Latin America), represented by its substitute agent Francis Arnold Corcell, hereafter to be called "THE CONTRACTOR".

BACKGROUND HISTORY

Supreme Decree No. 09 of January 2, 1974 authorized the Ministry of Natural Resources to initiate negotiations for acquisition, on behalf of CEPE, of a 25% interest in the August 6, 1973 contract for exploration and exploitation of hydrocarbons, and of assets acquired by Texaco Petroleum Company and Ecuadorian Gulf Oil Company in carrying out that contract. By means of Ministerial Resolution No. 11882 of April 28, 1974, an Interministerial Commission was formed which would initiate negotiations authorized by the head of the Ministry of Natural Resources and Energy in Supreme Decree No. 09 of January 2, 1974.

On June 14, 1974, the Minister of Natural Resources and Energy, the General Manager of the ECUADORIAN STATE OIL CORPORATION and the representatives

of TEXACO PETROLEUM COMPANY and ECUADORIAN GULF OIL COMPANY signed an "Acta" in which the fundamental points of the negotiations were agreed upon, and which provided that the terms and conditions of the sale would be governed by contracts among the parties, in a participation contract which would be submitted to the National Government for approval.

The ECUADORIAN STATE OIL CORPORATION, by means of official letter No. 277-75-DF of March 26, 1975, informed the companies that the Board of Directors of the Corporation, in a January 9, 1975 meeting, had voted not to acquire a 25% interest in the Trans-Ecuadorian pipeline or related assets for the moment.

The Companies and the Contractor enter into the contract contained in the following clauses:

FIRST: PURPOSE OF THE CONTRACT

The contractor shall carry out an audit which shall serve to determine the price to be paid by the ECUADORIAN STATE OIL CORPORATION for the acquisition of a 25% interest that TEXACO PETROLEUM COMPANY and ECUADORIAN GULF OIL COMPANY hold in the August 6, 1973 contract for the exploration and exploitation of hydrocarbons, and the assets acquired by the Companies in carrying out that contract. This price shall be equal to 25% of the following items:

1. Investments made during the preproduction period, as defined in Decree No. 1383 of December 14, 1973. Preproduction investment shall be taken into account in its entirety, with whatever plan of amortization which is legally appropriate.

shall be taken into account for purposes of determination of the amount of investment in conformity with the preceding items. The amount in U.S. dollars shall be determined in the following way:

Amounts paid in foreign currency for goods and services outside the country.

The amount of U.S. dollars sold to the Banco Central del Ecuador in order to acquire the sucres then invested in Ecuador.

Investments made with sucres generated by local sales of crude petroleum, which shall then be converted into U.S. dollars at the official rate of exchange at the date of each investment.

The appropriate amortization or depreciation, in U.S. dollars, shall be deducted from the total amount in U.S. dollars obtained from adding the items

2. Investments made during the production period up until 00:01 hours of June 6, 1974, including assets subject to amortization or depreciation in conformity with Decree No. 1383.

3. The cost of equipment and materials in the warehouse on the date cited in the preceding paragraph.

4. The amount of amortization and depreciation for the period ending at 24:00 hours on June 5, 1974 shall be deducted from the amounts described in paragraphs 1 and 2, in conformity with Supreme Decree No. 1383.

5. The study shall not include investment in the Trans-Ecuadorian Pipeline from Lago Agrio to Balao, as defined in Clause 18 of the August 6, 1973 contract.

The value of the U.S. dollar at the moment when each investment was made

on the preceding list.

The results obtained with respect to the investments audited by the firm "Arthur Young & Company" for the exploration, pre-production and production period up until December 31, 1972 shall be provided.

Excerpts from the
1977 Transfer Agreement

TRANSLATION

Agreement between the Government of the Republic of Ecuador and the Corporacion Estatal Petrolera Ecuatoriana, "CEPE", on the one part and Ecuadorian Gulf Oil Company on the other part.

BACKGROUND

On 6 August 1973 a contract was executed for the exploration and exploitation of hydrocarbons between the Government of Ecuador and the companies Texaco Petroleum Company and Ecuadorian Gulf Oil Company, which was authorized by Decree No. 925 of 4 August 1973, published in the Official Registry No. 370 of 16 of the same month.

The Government of the Republic of Ecuador jointly with the named company

has held several conversations by means of their representatives in order to accomplish the withdrawal of the Gulf company, by payment of the corresponding investment by it in accordance with the mentioned contract.

Once an agreement was reached over the different aspects that appear in the following agreement, same has been set forth in the following clauses.

1.1 The Government of the Republic of Ecuador and the Corporacion Estatal Petrolera Ecuatoriana, CEPE, duly represented by Brig. Gen. Jaime Eduardo Semblantes Polanco, Economist Santiago Sevilla Larrea, Col. of General Staff Hector Miranda Guerrero, Minister of Natural and Energy Resources, Minister of Finances and Public Credit and the General Manager of the Corporacion Estatal Petrolera Ecuatoriana "CEPE", in

that order, and

1.2 Ecuadorian Gulf Oil Company hereinafter named Gulf, represented by Mr. Terence A. O'Brien in his capacity of General Attorney-in-Fact.

The authorizations and corresponding appointments are attached as validating documents.

2.1 By the present agreement Gulf transfers in perpetuity in favor of CEPE the totality of its rights in the assets that correspond to it in the present CEPE/TEXACO/GULF consortium and those that correspond to it in the Transecuadorian pipeline. Accordingly, as of 31 December 1976, at 06:00 hours the contract for exploration and exploitation of hydrocarbons entered into on 6 August 1973, authorized by Decree No. 925 of 4 August 1973, is extinguished as to Gulf by reason of transfer.

2.2 For the transfer established in the preceding paragraph of his clause the Government of Ecuador via CEPE, shall pay to Gulf the percentage that corresponds to it in the amount of the investments not amortized made in the performance of the contract of 6 August 1973 and those preceding, in accordance with the justifying documents for the investments and the respective physical inventory and, also the cost of equipment, materials and supplies in stock and in transit.

2.3 To establish the values corresponding to the investments mentioned in the preceding number, the amounts for amortization and depreciation taken up to December 31, 1976 shall be deducted.

2.4 For the purposes of this agreement, the total provisional value of the investments not amortized and the cost of

the equipment, materials and supplies in stock and in transit is fixed in U.S. Dollars 82,128,000. The definitive value shall be established by an audit by an independent specialized European firm of international prestige, designated by the parties.

2.5 CEPE shall pay to Gulf the value of the unamortized investment, the cost of the equipment, materials and supplies in stock and in transit in Dollars of the United States of America in the following form:

Gulf shall deposit in the account that the Central Bank of Ecuador maintains in the City Bank of New York the sum of U.S. Dollars 81,978,766.79 corresponding to the value of all the shipments of crude made by Gulf and not yet deposited as of January 1, 1977. The Central Bank of Ecuador shall deposit in

a guarantee account in the City Bank of New York the sum of U.S. Dollars 82,128,000 to which paragraph 2.4 of this agreement refers. The Central Bank of Ecuador and Gulf shall instruct the City Bank to simultaneously make effective the Gulf deposit to the account of the Central Bank on the one hand, and to transfer the value of the amount in the guarantee account to the account that Gulf maintains with the Mellon Bank in Pittsburgh on the other hand. Simultaneously the Central Bank shall give to the City Bank irrevocable instructions with respect to the percentage payment that corresponds to Gulf in compliance with the laws in force.

2.6 Simultaneously with the transfer of rights of Gulf in the assets to CEPE, both parties shall exchange irrevocable letters of credit for the amount of

U.S.$35,372,000 each. Both letters of credit must be issued by banking institutions, recognized world-wide, acceptable to each one of the parties and shall serve exclusively to guarantee to each one of the parties the payment of the difference, over or below, between the provision value, that is U.S.$82,128,000, and the definitive value to be established by the independent audit to be made as stipulated in Clause 2.4. The costs of each one of the mentioned letters of credit shall be for the account of each one of the parties.

2.7 CEPE shall contract for a loan to make the payment to Gulf using the following bases:

1.	Amount of Capital:	US Dls. 82,128,000
2.	Term of payment:	7 years
3.	Manner of payment:	By semesters calculated to make 14 equal payments including capital and interest
4.	Calculation of interest:	The calculation shall be made on the balance of capital not yet paid.

The interests on said loan shall be paid by CEPE up to a fixed annual interest equivalent to the prime rate effective for the City Bank and the Bank of America in New York, United States, at the closing of operations on 31 December 1976. In the event of differences existing between the prime rate of the

mentioned banks, the arithmetical average of both shall be used.

2.8 Any fluctuation in excess of the prime rate as of 31 December 1976 shall be paid by Gulf, likewise any additional cost over the fluctuating prime rate effective at the commencement of each period of payment, as is stipulated in Clause 2.7, up to a maximum of 2.5 percent, including the corresponding commissions, shall be for the account of Gulf.

2.9 For purposes of the loan that CEPE shall contract according to Clause 2.7, CEPE shall obtain a credit proposal which shall be submitted for Gulf's consideration within a period not longer than sixty days from the date of execution of the agreement, in order that Gulf may present to CEPE within a maximum period of 60 days from the presenta-

tion of the conditions of the credit submitted by CEPE, any direct credit proposal or formulated by third parties that improves the conditions that CEPE may have been able to obtain. In such event, CEPE undertakes to contract such loan within a maximum period of up to 60 days counted from the presentation of Gulf's proposal.

2.10 Until the 7 year loan is obtained by CEPE, said corporation shall obtain a short-term loan under the conditions stipulated in Clauses 2.7 and 2.8.

2.11 Within a maximum period of 60 days counted from the date of execution of the agreement, the parties must sign by mutual agreement the contract with the auditing firm stipulated in Clause 2.4. The auditing firm shall have a maximum period of 11 months, counted from the date of the execution of the contract,

for the rendering of this final report which must establish the definitive value of the transfer of rights in the assets. The creditor party shall have a maximum term of 30 days to collect from the letter of credit indicated in Clause No. 2.6.

2.12 Gulf declares that there is no lien nor real right upon the rights in the assets which are being transferred by this agreement.

2.13 With respect to the obligations that Gulf may have in favor of third parties and that do not appear in its accounting records, neither the Ecuadorian State nor CEPE assume any responsibility and must be taken care of by Gulf. Therefore, CEPE only assumes obligations in accordance with the present agreement.

2.14 The tributary matters derived from the contract that is extinguished by this agreement, shall be subject to the Ecuadorian laws, and may not be matter of any agreement.

2.15 Pending debts between the parties shall be satisfied in conformity with the law, within a period of sixty (60) days counted from the date of the execution of the agreement.

2.16 By the present agreement, all the rights and obligations that each one of the parties may have with respect to the other arising from the contract of 6 August 1973 are extinguished. Accordingly, apart from the rights and obligations established in the present agreement, neither the Ecuadorian State nor CEPE owe anything to Gulf, nor Gulf owes anything to the Ecuadorian State or to CEPE. Likewise, none of the parties has

any claim to be made to the other, for any reason, with the exception of those that derive from non-compliance with this agreement.

THIRD

In compliance with the provisions of Article fourth of Decree Number one thousand four hundred and thirty seven, of seventeen May nineteen seventy seven published in Official Registry Number three hundred thirty nine, of the eighteenth of the same month and year, the parties agree that if the auditing firm referred to in the Agreement should state that its final report cannot be submitted before the date of expiration of the letters of credit mentioned in Clause TWO, six of the Agreement, or if for any other reason it should not be able to present said final report before such date of expiration, the parties

shall duly proceed with the renewal of the indicated letters of credit or the opening of new letters, under the same conditions as the originals, in order that the guarantees of both parties may be maintained in effect for up to thirty days after the date of submission of the final Auditing report.

FOURTH

Incorporated into the public deed contained in this Agreement shall be the letter of instructions to Citibank from the Minister of Finances, the General Manager of the Central Bank of Ecuador and the General Agent of Ecuadorian Gulf Oil Company, in conformity with the provisions of clause Two, Five of this Agreement and subject to that established in Article Fifth of Decree Number one thousand four hundred thirty seven, of sixteenth May nineteen seventy seven,

published in the Official registry Number three hundred thirty nine, of the eighteenth of the same month and year. The General Agent of Ecuadorian Gulf Oil Company, Mr. Terence A. O'Brien, by means of communication of twenty third May nineteen seventy seven, addressed to the Minister of Finances and Public Credit states: "With respect to the Transfer Agreement authorized by Decrees one thousand sixty four and one thousand four hundred thirty seven, we clarify that Ecuadorian Gulf Oil Company shall not transfer to CEPE its liabilities, including its debts to third parties." Consequently, this document is also added as an integral part of this deed. This Agreement, which has the opinions issued by the Minister of Finances, Attorney General of the Nation, Comptroller General of the Nation, Chief of

the Joint Command of the Armed Forces, appearing in Official Documents Numbers one thousand seven hundred seventy seven, two thousand five hundred fifty four, zero-forty-two-DC, zero-zero-ninety-nine-G3c., of the twenty third May nineteen seventy seven, respectively, and Number zero-sixteen-five hundred-ninety six of the President of the Monetary Board, of the twenty fifth May nineteen seventy seven, for its full validity was authorized by Decree Number one thousand sixty four of the thirteenth January nineteen seventy seven, published in the Official Register Number two hundred sixty two, of the twenty fifth of the same month and year, and Substitutive Decree Number one thousand four hundred thirty seven of the seventeenth May nineteen seventy seven, published in Official Register Number three

hundred thirty nine of the eighteenth of the same month and year and which provides that it be raised to public deed that extinguishes, with respect to Gulf, the effects of the contract of six August nineteen seventy three. The following qualifying documents are attached: appointment and taking of office by the Ministers of Natural and Energy Resources and of Finances and Public Credit, and General Manager of the Corporacion Estatal Petrolera Ecuatoriana (CEPE); recording of the translation of the power granted by the Compania Ecuadorian Gulf Oil Company in favor of Mr. Terence Andrew O'Brien; the text of the agreement approved by the National Government in Cabinet session of the fourth January nineteen seventy seven, duly certified by the Secretary General of Public Administration, on the

eighteenth May nineteen seventy seven and which the same official remitted with Official Letter Number seventy seven-zero-zero-eight-PG, of that same date to the Minister of Natural and Energy Resources, the letter of twenty three May nineteen seventy seven that Mr. Terence O'Brien addressed to the Minister of Finances and Public Credit, the documents which contain the decisions and certified copies of Decrees Number one thousand sixty four and one thousand four hundred thirty seven, mentioned in this deed. The parties ratify themselves the contents of these minutes and elevate to public deed so that it may have the effects of law. Quito, May twenty six, nineteen seventy seven. The minutes which end here, is signed by Doctor C.H. Palacios B., under Registry Number zero seventy six of the

Lawyer's College of Guayaquil. For the granting of this deed, the appropriate legal precepts were observed; and upon being read by me, the Notary, in its totality to those present, each and every one of its parts are affirmed and ratified; and they sign along with me, to all of which I bear witness. (signed) Jaime Eduardo Semblantes Polanco. (signed) Santiago Levilla Larra. (signed) Hector Miranda Guerrero. (signed) Terence A. O'Brien. The Notary (signed) Doctor Benjamin Cevallos Solorzano.

* * *

(Line 26, p.21 reverse of original) The Spanish text continues,- in translation:-

21 rev. REPUBLIC OF ECUADOR.- SUPREME GOVERNMENT COUNCIL.- I CERTIFY THAT THE AGREEMENT I AM

SENDING ENCLOSED IS A FAITHFUL

22 COPY OF THE ORIGINAL FILED WITH THE PRESIDENCY OF THE REPUBLIC AS IT WAS APPROVED BY THE CABINET IN ITS ORDINARY SESSION OF THE FOURTH DAY OF JANUARY OF THIS YEAR. Quito, eighteenth of May, nineteen hundred and seventy seven.- (signed) Víctor Hugo Garcés Pozo, Commander, General Staff, GENERAL SECRETARY OF PUBLIC ADMINISTRATION.- REPUBLIC OF ECUADOR.- MINISTRY OF FINANCES.- Official Letter Number one thousand seven hundred and seventy seven.- His Excellency Brigadier General Eduard Semblantes, MINISTER OF NATU-

RAL RESOURCES AND ENERGY.- At His Office Dear Minister: With reference to your official circular letter Number seventy seven three hundred and eleven-DM, I present you with the legal opinion that follows hereafter: The Ministry of Finances studied in the first place the convenience of the purchase of the rights and shares in the Consortium, having established that the flow of income generated by the exportation of petroleum corresponding to the percentage of thirty seven point five percent (37.5%) during the foreseeable operative productivity period of exploitation

of the existing oil wells, is greater than the cost to be paid to Gulf for its participation in the Petroleum Consortium.- The period of exploitation of the oil fields was calculated at twenty years and the income was computed on the basis of the current market prices, after deduction costs, there remaining as a liquid profit the pure income of one point forty (1.40) per exported barrel. The present value of such income for the period of twenty years is greater than the payment to be made by

22 rev. CEPE of EIGHTY TWO MILLION ONE HUNDRED AND TWENTY EIGHT THOUSAND DOLLARS (U.S.$

82,128,000.00) equivalent to the computation made by the Board of Hidrocarbons for the Assets which are acquired through the purchase of the shares and rights. Therefore, this Ministry emits a favorable opinion with regard to the convenience of the acquisition of the shares and rights of Gulf in the Ecuadorian Oil Consortium.-

OFFICIAL BULLETIN (Quito, Wednesday, May 18, 1977, Year II, Number 339)

DECREE No. 1438

THE SUPREME GOVERNMENT COUNCIL,

WHEREAS,

By Decree No. 1064 of January 13th, 1977, published in the Official Bulletin No. 262 of the same month and year, the Ministers of Natural Resources and Energy and of Finances, and the General Manager of the Ecuadorian State Petroleum Corporation (CEPE) are authorized to sign the agreement for transfer of shares and rights that correspond to Ecuadorian Gulf Oil company in accordance with the contract of August 6th, 1973, in favor of CEPE;

That in clause 2.6 of the mentioned agreement there is stipulated the exchange of irrevocable letters of credit between Gulf and CEPE, for an amount of

US$ 35,372,000 each, which will exclusively serve to guarantee to each of the parties the payment of the difference plus or minus between the provisional amount, that is, US$ 82,128,000 and the definite amount to be determined by the independent auditors to be done in accordance with what is stipulated in clause 2.4, and,

Using the powers that have been invested in it;

Decrees:

Art. 1st.- The General Manager of the Ecuadorian State Petroleum Corporation is authorized to subscribe, on his own or through delegation of powers, the so-called "Guarantee Agreement" with the Bank of America NT & S.A., for the amount of US$ 35,372,000, that corresponds to the letter of credit, that for an equal amount, that banking entity

opens in favor of CEPE, and the Minister of Finances so that he can, in name and representation of the National Government, personally or by delegation or powers, guarantee the obligations undertaken by the Corporation by virtue of same.

Art. 2nd.- All the payments of principal, interests and commissions derived from the application of the Agreement and Guarantee, whose signing is authorized by this Decree, shall be exempt from taxes, charges or burdens of any nature whatsoever.

Art. 3rd.- The Minister of Finances and Public Credit is entrusted with the application of this Decree, which has a special character, and which will enter into force from this date, without de-

triment of its publication in the Official Bulletin.

Issued in the National Palace, in Quito on May 17th, 1977.

signed: Vice Admiral Poveda Urbano, General Commander of the Navy, President of the Supreme Council of Government; sgd: General Guillermo Duran Arcentales, Commander General of Ground Forces, Member of the Supreme Council of Government; sgd; Brigadier General Luis Leoro Franco, Commander General of the Air Foirce, Member of the Supreme Council of Government.

signed: Economist Santiago Sevilla Larrea, Minister of Finances and Public Credit.

This is a copy.- I so certify.

Signed: Victor H. Garces Pozo, Commander of the General Staff, General Secretary of the Public Administration.

Telex from Martinez
to Texaco

06E 05/23
TEXACO CGBL

2225 TEXACO ED

QUITO 5/23/74

U R G E N T

TEXLAT CORAL GABLES RC5

E-1040
QQ FOLLOWING LETTER JUST RECEIVED FROM MINISTER
QUOTE
OFFICIAL LETTER NO. 74-129-CA
QUITO MAY 23, 1974

GENERAL MANAGER OF GULF
QUITO
MISTER MANAGER:

IN ACCORDANCE WITH WHAT WAS AGREED AMONG US DURING THE NEGOTIATIONS THAT ARE BEING CARRIED OUT IN ORDER FOR CEPE TO BUY THE 25 PERCENT OF THE RIGHTS AND SHARES CONFERRED TO TEXACO-GULF IN THE EXPLORATION AND EXPLOITATION CONTRACT AND OF THE ASSETS ACQUIRED BY THE CONTRACTORS FOR THIS PURPOSE, AND BECAUSE IT IS THE DECISION OF THE GOVERNMENT, THIS IS TO OFFICIALLY NOTIFY YOU THAT, STARTING AT 0:00 HOURS ON JUNE 6, 1974 CEPE WILL START TO RECEIVE, IN KIND, THE 25 PERCENT OF THE PRODUCTION OF THE AREA CONTRACTED WITH THE TEXACO-GULF CONSOR

TIUM, WITHOUT PREJUDICE OF CONTINUING WITH THE ABOVE MENTIONED NEGOTIATIONS.

VERY TRULY YOURS,
GUSTAVO JARRIN AMPUDIA
MINISTER OF NATURAL AND ENERGETIC RESOURCES
CC: GENERAL MANAGER OF CEPE
MANAGER - TEXACO
UNQUOTE

OUR COMMENTS AND RECOMMENDATIONS WILL BE SENT VIA SEPARATE TELEX. PLEASE GIVE COPY OF TELEX TO LUMPKIN AS PER DIAZ' REQUEST.
QK

MARTINEZ

NNN

Memo from Lucas to Gulf

29 September 1976

GULFOIL
PITTSBURGH

FOR MR. LEE COPY MESSRS. MINKS AND REES

GEMCO
HOUSTON

FOR MR. WALKER COPY MR. FULLER

GULFOIL
WASHINGTON

FOR MR. ORTIZ

LD-907

HEREWITH COPY OF STATEMENT OF GULFS WILLINGNESS TO MAKE DEPOSITS IN ECUADOR CENTRAL BANK GIVEN TO STATE DEPARTMENT ON 28 SEPTEMBER 1976:

QUOTE GULF's PAYMENTS

A) With respect to outstanding unpaid deposits corresponding to cargoes of Oriente crude oil Gulf represents that:

1) The total sum is $52,923,382.26 corresponding to liftings made during the period commencing on 22

February 1976 and ending upon 15 August 1976.

2) The portion of the sum mentioned in the preceding paragraph No. 1 which should be returned to Gulf is $7,051,956.93.

3) The total sum paid with respect to liftings of cargoes of Oriente crude oil sold to third-party buyers during the period commencing on 25 August 1976 and ending on 30 September 1976 is $27,111,044.10.

4) The portion of the sum mentioned in paragraph No. 3 which has been returned to Gulf is $3,739,412.25.

B) Gulf will deposit to the agent bank of the Central Bank in Ecuador the sum of $25,812,338.16 on 1 October 1976. This deposit is made upon the understanding that the Central Bank of Ecuador will return to Gulf, at the time

of said deposit, the sum of $3,312,544.68 and the Central Bank will credit the sum of $27,111,044.10 so as to satisfy the unpaid portion of the sum mentioned in paragraph No. 1 above and to satisfy the requirements of Monetary Board Regulations No. 814 with respect to that same sum but without obligation to return to Gulf the sum of $3,739,412.25 mentioned in paragraph No. 4, which latter sum Gulf acknowledges having already received.

C) Gulf will make deposits, pursuant to existing Monetary Board Regulations 814 as they may become due, during the period that negotiations are in progress on the understanding that GoE proceeds to comply opportunely with its commitments to purchase Gulf's rights, obligations and properties in accord with the terms and conditions set forth

in the Letter of Assurances given by the GoE to the Government of the U.S. Furthermore at the time final documents are executed which transfer Gulf's interests to the GoE, Gulf would be willing to undertake, with respect to then unpaid obligations of Gulf, to give assurances not inferior to those given by the GoE with respect to its obligations to Gulf either in the form of a separate document or as part of the documentation for the transfer of Gulf's rights, obligations and properties. UNQUOTE.

LUCAS

cc: Messrs. T.D. Lumpkin
P.E. Wyche
P.J. McNulty
E. Harkins
J.L. Hammer

Memorandum from Lucas
to the File

MEMORANDUM TO THE FILE

1 October 1976
Coral Gables

RE: Memorandum of the
Government of Ecuador
handed to the U.S.
Embassy, Quito, Ecuador
on 30 September 1976

This memorandum will record comments as of 1 October 1976.

The memorandum omits mention of the document by which Ecuador's State oil company acquired the 25% interest in Gulf's participation in the contract of 6 August 1973. The reasons for this omission are obscure. Reference to the Acta of 14 June 1974 was proposed as factual and necessary to a correct description of the participation held by Gulf.

The Gulf proposal for choice of law to determine the net unamortized invest-

ments in Ecuador was the law of Ecuador in effect on the date of the memorandum, i.e. 30 September 1976. The purpose of this suggestion is that the formula for net book value was established by Decree 1383 of 14 December 1973 which sets forth the accounting procedures for both corporate accounting and income tax purposes in Ecuador. The same procedure was determinative for establishing the values of the 25% interest acquired by the Ecuadorian State oil company in 1974 and also determinative of the amounts of amortization (generally inferior to the corresponding amortization on U.S. books,) and does not recognize expensing of intangible drilling cost. The language of the memorandum has changed this concept to a net unamortized investment determined in accord with the laws of

Ecuador in effect on the date of transfer, i.e. 31 December, 1976. This, of course, exposes Gulf to the risk that modifications in the accounting procedures may be adopted by decree between now and the end of the present year. Gulf has some defense in the sense that conversations between Ambassador Bloomfield and representatives of the Ecuadorian Government include commitments to bona fide negotiations of the purchase price which, talks, hopefully, include commitments concerning the government's disposition to deal with values under the existing state of the law.

The memorandum does not adopt Gulf's position with respect to the purchase of the pipeline. Gulf proposed that the Government acquire Gulf's interest in the pipeline by the same procedure by which the Government proposed

to acquire other investments. The language of the memorandum is ambiguous and subject to interpretation that this specialized audit is a condition precedent to the Government's obligation to purchase.

We note that the language in paragraph 7 limits the utilization of an independent opinion of an external audit to differences about the amount of the Government's debts to Gulf, apparently makes this device inapplicable to Gulf's debts to the Government, perhaps anticipating the use of Article 10 of the Hydrocarbons Law for the latter case, an unpleasant prospect.

The memorandum omits commitment to maintain in effect the existing 120 day credit float for third-party crude oil sales which permits delay of deposits into Ecuador's foreign exchange control

system during a period up to 120 days after lifting. It also omits any mention of possible arbitration. It omits express commitment to credit the $27.1 millions against the arrears deposits into the foreign exchange control system; but this obligation can be inferred from the statement in the memorandum that Ecuadorian Gulf Oil has paid all sums owing the Government opportunely and, therefore, forfeiture of the contract is inapplicable. This point may have already become moot, and it will indeed be moot upon delivery of the signed copy of the memorandum.

The memorandum omits reference to the concept that transfer of the Gulf participation involves obligations as well as rights.

I am advised by Mr. Stephen Schwebel, Deputy Legal Adviser of the

State Department, that upon delivery of the signed copy of the memorandum, that the State Department has instructed the U.S. Ambassador to respond with a letter on behalf of the U.S. Government (1) acknowledging receipt of the memorandum, (2) taking note of the expression of assurances on the part of the Ecuadorian Government, (3) repeating the text of the Ecuadorian memorandum verbatim, and (4) concluding the note by mentioning Gulf's assurances to make payments into the exchange control system with confidence that the Government will go forward with its commitments under the memorandum. Gulf has given a letter of like assurances to make payments in accord with the provisions of foreign exchange control regulations interpreted to continue in effect the present 120 days credit float. Mr. Schwebel is of

the opinion that the exchange of notes elevates the arrangement to a bilateral inter-government agreement enforceable under international rules of law.

In addition to the exchange of notes between the two governments, at my suggestion, Ambassador Bloomfield is being instructed by the State Department, to prepare a memorandum setting forth his recollections of all commitments made by representatives of the Ecuadorian Government to him about the following points:

a) To maintain in effect the 120 day credit float provisions.

b) Commitment to commence and carry forward opportune bona fide negotiations to accomplish the acquisition of Gulf's participation and to resolve problems within the framework

of audits and negotiation. This could avoid much of the impact of Article 10 of the Hydrocarbons Law. Article 10 gives the Minister of Natural and Energy Resources exclusive jurisdiction to resolve all questions of fact and law which arise in connection with the oil industry.

c) The Government's commitment to credit the $27 million against the deposits in arrears.

d) The commitment to undertake obligations which are inherent in the participation being acquired by the Government of Ecuador.

e) Representations, if any, about maintaining the present state of the law for the purposes of

determining net unamortized investment.

In the view of the State department, the commitments made to Ambassador Bloomfield, although expressed orally, constitute obligations of the government of Ecuador to the U.S. Government.

Copy of the memorandum and translation included.

Glenn C. Lucas

cc: Messrs. M.E. Minks - Pittsburgh
R. Rees "
R.W. Fuller - Houston
T.D. Lumpkin - Coral Gables
P.E. Wyche "
P.J. McNulty "
J.L. Hammer "
T.A. O'Brien - Quito
J.C. Wilcox "

No. 88-158

Supreme Court, U.S.
FILED
SEP 26 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PHOENIX CANADA OIL COMPANY LIMITED,

Plaintiff-Petitioner,

—v.—

TEXACO PETROLEUM COMPANY, ECUADORIAN GULF OIL COMPANY and GULF OIL CORPORATION (now, by change of name, CHEVRON U.S.A. INC.),

Defendants-Respondents,

—and—

TEXACO INC.,

Defendant.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Scott M. Berman
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RULE 28.1 LIST

The parent company of Texaco Petroleum Company ("Texaco Ecuador") is Texaco International Financial Company, which is wholly owned by Texaco Overseas Holding, Inc. Texaco Overseas Holding, Inc. is wholly owned by Texaco Refining and Marketing, Inc. Texaco Refining and Marketing, Inc. is wholly owned by Texaco Inc. ("Texaco").* The only affiliate or subsidiary of Texaco Ecuador, owned in part by entities or individuals outside the Texaco organization is Compania Texaco de Petroleos del Ecuador, C.A.

The parent company of Ecuadorian Gulf Oil Company ("Gulf Ecuador") is Trans Ocean Chevron Company, which is wholly-owned by Chevron Corporation. There are no affiliates and subsidiaries of Gulf Ecuador owned in whole or part by entities or individuals outside the Chevron organization.

The parent company of Gulf Oil Corporation (now, by change of name, Chevron U.S.A. Inc.) ("Gulf") is Chevron Corporation. The affiliates and subsidiaries of Chevron U.S.A. Inc. owned in part by entities or individuals outside the Chevron organization are as follows:

American Overseas Petroleum Limited
Arabian American Oil Company
Associated Octel Company Limited
Caltex Petroleum Corporation
Gaviota Gas Plant Company
Hong Kong Refuelling Company Ltd.
Iranian Oil Participants Limited
P. T. Caltex Pacific Indonesia
Pembroke Capital Company Inc.

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* Texaco Inc. was originally a party to this action and participated in the trial. In April, 1987, it filed a petition for protection under Chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 1101 *et seq.* Based on the automatic stay provision in the Bankruptcy Code, 11 U.S.C. § 362, the district court did not enter final judgment in favor of Texaco Inc. and it was not a party to the proceedings before the United States Court of Appeals for the Third Circuit.

Stillwater Mining Company
Stillwater PGM Resources
Valley Pines Associates
Valley Venture Capital Fund Ltd. Partnership

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-158

PHOENIX CANADA OIL COMPANY LIMITED,

Plaintiff-Petitioner,

—v.—

TEXACO PETROLEUM COMPANY, ECUADORIAN GULF OIL COMPANY and GULF OIL CORPORATION (now, by change of name, CHEVRON U.S.A. INC.),

Defendants-Respondents,

—and—

TEXACO INC.,

Defendant.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

STATEMENT OF THE CASE

Petitioner Phoenix Canada Oil Company Limited ("Phoenix") seeks review of the district court's determination, unanimously affirmed by the court of appeals, that its unjust enrichment claim has no factual basis. The ruling followed from the district court's: (a) legal conclusion that the unjust enrichment claim turns on whether the Government of Ecuador, when it became a participant in an oil concession in Ecua-

dor, reimbursed Texaco Ecuador and Gulf Ecuador for their investments or paid them for rights to produce oil, and (b) finding of fact that the Government reimbursed the companies for their investments.

Phoenix contends that the act of state doctrine requires that the fact issue of what the Government paid for be resolved solely by reference to selected phrases in selected documents, principally Spanish-language decrees and a regulation of the Government of Ecuador. Phoenix argues further that the district court, by finding as a fact, that the Government reimbursed the Companies for their investments, violated the act of state doctrine by "invalidating" the decrees and regulations, which Phoenix asserts establish that the Government paid for rights to produce oil.

The central issue raised by Phoenix's petition is the interpretation of Ecuadorian decrees and a regulation. These pronouncements relate solely to the transactions at issue here and their construction is a matter of significance only to the parties to this action. This alone is ample reason to deny Phoenix's petition. Even if the Court were to decide to devote its resources to interpreting the Ecuadorian decrees and regulation, Phoenix's proffered constructions are incorrect and it has not raised any legitimate act of state issue. The act of state doctrine precludes United States courts from addressing the legality of the acts of a foreign sovereign. The courts below did not conclude that the decrees and regulation were issued in violation of the law of Ecuador and the district court, in finding that the Government reimbursed the Companies for their investments, did not determine that the Government violated the law of Ecuador.

Statement of Facts

Respondents set out below a brief statement of the pertinent facts and prior proceedings.[1]

---

1 Comprehensive recitations of the facts and prior proceedings are set out in the opinions of the lower courts. (A40-A116; A3-A12.)

A. Background

In July 1961, the Government of Ecuador granted a concession to Minas y Petroleos del Ecuador, S.A. ("Minas"), an Ecuadorian corporation, authorizing it to explore for oil in the jungle region of eastern Ecuador and to exploit such reserves as it might discover. (A4; A46.)[2] On July 16, 1965, Minas, in a contract executed in Ecuador, agreed to assign to two Ecuadorian subsidiaries of Texaco Inc. ("Texaco") and Gulf Oil Corporation ("Gulf"), a portion of the concession which came to be known as the Coca Concession. (A4; A51-52.) The Texaco and Gulf subsidiaries agreed to pay Minas: (a) a lump sum payment when the proposed assignment was approved by the Government of Ecuador, and (b) if they discovered reserves and commercially produced and sold crude oil, future payments to be made quarterly in amounts equal to 2% of the value of such crude oil as they sold. (A41; A52-53.) Minas assigned its interest in future 2% payments to Phoenix and another corporation. (A64-68.)

Beginning in 1969, Texaco Petroleum Company ("Texaco Ecuador") and Ecuadorian Gulf Oil Company ("Gulf Ecuador")[3], which operated the Coca Concession for the Ecuadorian subsidiaries of Texaco and Gulf, made a series of highly successful wildcat discoveries. (*See* A5; A54.) In May 1972, they began to commercially produce and sell crude oil from the Coca Concession. (A5; A54.) During the period from 1966 through 1972 the Companies invested huge sums of money to explore the concession area and then to acquire and install the infrastructure, including a pipeline to transport the oil from eastern Ecuador across the Andes Mountains and a marine terminal on the Pacific Coast, required to exploit the reserves they discovered. (A54-55; A5.) By 1972, the Companies' investment had exceeded $240,000,000. (A62.) Neither Minas nor Phoenix contributed to the investment. (A93-94.)

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2 References to "A" are to Appendix A to the petition for certiorari.

3 Texaco Ecuador and Gulf Ecuador are referred to herein as the Companies.

B. The 1974 and 1977 Transactions

In 1974, approximately two years after Texaco Ecuador and Gulf Ecuador had begun to commercially produce and sell crude oil (A5; A54), the Government of Ecuador forced the Companies to transfer a 25% interest in the Coca Concession to the state-owned oil company, Corporacion Estatal Petrolera Ecuatoriana ("CEPE"). (A79-91; *see* A6-7.) The Government unilaterally determined that it would pay the Companies an amount precisely equal to 25% of the actual cost of their investments in the concession, reduced by depreciation. (A91-93; A7.)

During the period from 1974 through 1976 the Government imposed on the Companies a series of expropriatory measures which drastically reduced the profitability of their operations. (A97-104; A8.) The Companies and the Government clashed frequently over these measures and the Government's implementation of them. (A101-104.) At the end of 1976, Gulf Ecuador faced a Government declaration of forfeiture of its remaining 37.5% interest in the Coca Concession as a result of confrontations with the Government. (A104.) Under this pressure, it negotiated an agreement with the Government providing that Gulf Ecuador would leave Ecuador and the Government would succeed to Gulf Ecuador's 37.5% interest in the concession as of December 31, 1976. (A 104-105; A8-9.) As in the case of the 1974 transaction, the Government limited its payment to Gulf Ecuador to the cost of its remaining investments in Ecuador, less depreciation. (A105-107; A9.)

C. The Effect of the 1974 and 1977 Transactions on the 2% Payments

The Minister of Natural Resources and Energy of the Republic of Ecuador (the "Minister") specifically addressed the effect of the 1974 and 1977 transactions on the quarterly 2% payments. In a regulation issued three days before the date CEPE's 25% participation became effective, the Minister directed that neither the Companies nor CEPE was to make 2% payments on the 25% of oil production that CEPE received based on the

1974 transaction. (A94-95; *see* A18-20.) Four months after the regulation, the Minister extended the prohibition on 2% payments to any increased participation above 25% that CEPE might obtain in the future. (A96-97.) Based on the foregoing, the Companies stopped making 2% payments first on CEPE's 25% share of oil production and then on CEPE's additional 37.5% share of oil production. (A96-97.) Texaco Ecuador continued to make 2% payments on its 37.5% of production. (A9.)

Proceedings Below

Phoenix commenced this diversity action in the United States District Court for the District of Delaware on November 26, 1976 against Texaco, Gulf, Texaco Ecuador and Gulf Ecuador. (A40-41.) In its Complaint and Supplemental Complaint, Phoenix asserted three purported claims based on the 1974 and 1977 transactions: (a) a breach of contract claim, seeking damages equal to the total amount of the 2% payments on CEPE's oil production from the Coca Concession; (b) in the alternative, an unjust enrichment claim seeking portions of the compensation the Government paid to the Companies in connection with the 1974 and 1977 transactions; and (c) an intentional infliction of economic injury or *prima facie* tort claim seeking compensatory and punitive damages. (A40-41.)[4]

On defendants' motion for summary judgment, the district court, based on two careful and detailed magistrate's reports, dismissed Phoenix's breach of contract and tort claims. (A42-43.)[5] The district court denied summary judgment on Phoenix's unjust enrichment claim, concluding that its resolution turned

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4 Phoenix also asserted a breach of contract claim unrelated to the 1974 and 1977 transactions, for alleged deficiencies in the 2% payments for three quarterly periods—the fourth quarter of 1973 and the first two quarters of 1974. (A44-45.)

5 The district court held that Phoenix's breach of contract claim was governed by Ecuadorian law, that the Ecuadorian law applicable to the claim was the Minister's 1974 regulation and judgment, and that the claim failed as a matter of law. (A42.) The district court dismissed Phoenix's tort claim because the underlying acts were either time-barred or not tortious. (A42-43.) Phoenix has not challenged either of these determinations in its petition.

on a fact question—whether the Government had paid the Companies for rights to produce oil or whether it had reimbursed them for their investments in the concession—that the documents before it were not sufficiently clear to resolve the question of what the Government paid for, and that a trial was necessary to resolve this fact issue. *Phoenix Canada Oil Co. Ltd.* v. *Texaco, Inc.*, 560 F. Supp. 1372, 1384 (D. Del. 1983).

The district court then conducted a lengthy trial at which it received extensive evidence on the issue of what the Government paid for in the 1974 and 1977 transactions. After the trial, the court, in a detailed opinion, meticulously analyzed the evidence and found that it overwhelmingly demonstrated that the Government of Ecuador had reimbursed the Companies for their investments in Ecuador and had not paid anything for rights to produce oil. (A113-117; A10.)[6] Based on its finding, the district court granted judgment dismissing the unjust enrichment claim. (*Id.*)

Phoenix appealed from the dismissal of its unjust enrichment claim. The court of appeals thoroughly reviewed the evidence

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6 The district court relied primarily on the following evidence:

— The uniform testimony of all witnesses who directly participated in the 1974 and 1977 transactions, including Ecuador's Minister of Natural Resources in 1974 and his legal advisor, that the Government had paid the Companies only for their unrecovered investments in producing and pipeline assets and had paid nothing for rights to produce oil. (A113-A114.)

— The amounts that the Government paid to the Companies, which were precisely equal to the cost of their unrecovered investments, reduced by depreciation. (A114.)

— The law and policy of the Government with respect to Ecuador's hydrocarbons resources, which it had consistently applied in other circumstances involving the Companies' interests in the Coca Concession, that concession rights were part of Ecuador's national patrimony and the Government could not as a matter of Ecuadorian law pay for petroleum reserves or rights to exploit them. (A114; A80-81; A85-90).

— The Minister's hostility to the concept of the 2% payments, which he viewed as an illegal attempt by private parties to allocate among themselves Ecuador's natural resources, and his regulation and judgment prohibiting 2% payments on CEPE's oil. (A115.)

and concluded that the district court's factual finding—that the Government had reimbursed the Companies for their investments and had not paid for rights to produce oil—was supported by the overwhelming weight of the evidence. (A13-15.) The court unanimously affirmed the judgment dismissing the unjust enrichment claim. (*Id.*)

REASONS FOR DENYING THE WRIT

The petition does not take issue with the district court's determination that unjust enrichment turns on whether the Government paid the Companies for oil production rights or reimbursed them for their investment. In an effort to circumvent the district court's adverse fact-finding, Phoenix seeks to implicate the act of state doctrine. Its argument is that three Ecuadorian decrees and a regulation issued by the Minister address the issue of what the Government paid for—purportedly by providing that the Government acquired oil production rights in the 1974 and 1977 transactions—and that the act of state doctrine requires that United States courts resolve the fact question of what the Government paid for solely by reference to the decrees and regulation.

The threshold question that Phoenix's argument raises is the interpretation of four Ecuadorian Government pronouncements—Decrees No. 666, 1030 and 1438 and Resolution No. 12560 of the Minister. Before the Court considers any act of state argument, it must decide whether the decrees and regulation address and resolve the question of what the Government paid for in connection with the 1974 and 1977 transactions. This narrow inquiry has no significance beyond resolving Phoenix's unjust enrichment claim in this action. The decrees and regulation bear only on the 1974 and 1977 transactions and do not even relate to Ecuadorian law of general applicability. The meaning of the decrees and regulation has no significance to United States companies seeking to structure commercial transactions here or in Ecuador. Thus, Phoenix's petition for certio-

rari raises issues that demonstrably are not "special and important" (Sup. Ct. R. 17.1).[7]

Should the Court embark on the task of construing the Ecuadorian decrees and regulation, it will quickly become clear that the meanings Phoenix attributes to them are incorrect. A plain reading of the operative provisions of Decrees No. 666, 1030 and 1438 makes clear that they do not determine what the Government paid for in connection with the 1974 and 1977 transactions. They identify the sources of the funds to be drawn on in order to pay the Companies and prescribe procedures for making the payments. Thus, Decree No. 666 earmarks funds from Ecuador's International Monetary Reserve to make the first payment to the Companies and authorizes various state entities, such as the Central Bank, the Finance Minister, and the state-owned oil company, CEPE, to execute the documents required to make the funds available. The provisions of Decree No. 1030 mirror those in Decree No. 666 for the second payment by the Government to the Companies and fix the date for making the payment. Decree No. 1438 also addresses the mechanics, not the object of the payment. It authorizes the General Manager of CEPE to execute documents the Government requires to obtain the letter of credit which the Government was to deliver to Gulf Ecuador as part of the 1977 transaction.[8]

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7 Phoenix's argument that the court of appeals improperly concluded that Ecuador's 1971 Hydrocarbons Law changed the character of rights to produce oil to a revocable license—an argument that has nothing to do with the act of state doctrine (Cert. Pet., p. 59)—likewise is an extremely narrow issue of Ecuadorian law, and its resolution one way or the other does not raise "special and important" policy concerns.

8 Phoenix relies on recitals in Decrees No. 666 and 1030 which refer to acquiring "rights and assets." Recitals have no operative effect. Furthermore, the "rights and assets" phrase that appears in the recitals is the same phrase that appears in documents that were before the district court on defendants' motion for summary judgment. When Phoenix relied on the phrase in purported support of its position that the Government had paid for rights, the district court concluded it was too ambiguous to resolve the issue of what the Government paid for, and directed that a trial be held to resolve the issue. Phoenix Canada Oil Co. Ltd. v. Texaco, Inc., 560 F. Supp. 1372, 1384 (D. Del. 1983).

Resolution No. 12560 of the Minister of Natural Resources, also relied on by Phoenix, reinforces the district court's finding that the Government reimbursed the Companies for their investments. It provides for the execution of a contract by the Government, the Companies and an independent auditor which is to determine the book value of the Companies' investments, less depreciation. (A404-410.) Since the audit was limited to the Companies' investments and was mandated by the Government to establish the amount it would pay to the Companies, the regulation is clear evidence of the Government's intention to reimburse the Companies solely for their investments.[9]

Even if the Court were to adopt Phoenix's interpretation of the Ecuadorian decrees and regulation that it relies on, Phoenix's formulation of the act of state doctrine is totally misconceived. *See, e.g., Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 401 (1964) (the act of state doctrine "precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory."); *Alfred Dunhill of London, Inc.* v. *Cuba*, 425 U.S. 682, 697 (1976) ("The major underpinning of the act of state doctrine is the policy of foreclosing court adjudications involving the legality of acts of foreign states . . . ."); *Underhill* v. *Hernandez*, 168 U.S. 250, 252 (1897) ("Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory."). The doctrine properly formulated and applied, has no bearing on the resolution of the fact question underlying the unjust enrichment claim.

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9 Phoenix relies on a few other documents in connection with its act of state argument: the audit contract among CEPE, the Companies and the auditor covering the 1974 transaction and a letter written by the Minister of Finance and appended to the 1977 Transfer Agreement. They are not laws. Thus, even if Phoenix's formulation of the act of state doctrine were to be accepted, the documents are irrelevant to its argument that the act of state doctrine mandates that United States courts must look solely to foreign laws to resolve fact issues before the court.

The district court did not hold that the Ecuadorian pronouncements relied upon by Phoenix were invalid. A declaration of invalidity of a foreign government decree requires a finding that the government or its instrumentality lacks authority to promulgate the act in question. *See Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 415 n.17 (1964). In this action, defendants did not challenge the authority of the Government to issue the three decrees and regulation and the district court did not address the question of whether the President and the Minister had the power to issue them.[10]

Phoenix's argument that the district court's holding "in effect invalidated" the Ecuadorian decrees and regulation (Cert. Pet., p. 40), is predicated on the proposition that the act of state doctrine mandates that United States courts affirmatively adopt and apply the laws of a foreign state to the exclusion of all other evidence in resolving fact issues. Phoenix has not cited any authority which supports this formulation of the act of state docrtine and our research has disclosed none. Indeed, the Supreme Court authority cited above indicates that the act of state doctrine is a doctrine of abstention by United States courts. Thus, Phoenix's assertion that the doctrine required the district court to look only at the three decrees and the regulation and exclude all other evidence in determining what the Government paid the Companies for in the 1974 and 1977 transactions is without merit.

Even under Phoenix's interpretation, the decrees and regulation merely would be statements by the Government of what, in fact, it paid for, and thus, simply evidence of the Government's intention. Phoenix has not pointed to any Ecuadorian law man-

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10 Phoenix's argument that the district court selectively applied the act of state doctrine by holding that Resolution No. 11927 barred Phoenix's breach of contract claim and not applying the act of state doctrine to the unjust enrichment claim in Phoenix's favor, is baseless. On defendants' motion for summary judgment, Phoenix challenged the authority of the Minister to issue Resolution No. 11927. The district court, relying on Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964), held that the act of state doctrine requires that the regulation be given an irrefutable presumption of validity. Phoenix Canada Oil Co. Ltd. v. Texaco, Inc., 560 F. Supp. 1372, 1381 (D. Del. 1983).

dating that the Government pay the Companies for rights to produce oil in connection with the 1974 or 1977 transaction. Absent such a legal mandate, there is no basis in the act of state doctrine for precluding the district court from finding as a fact that the Government paid the Companies only for their investments. Such a finding could not possibly be considered a judicial determination that the Government of Ecuador had violated Ecuadorian law in carrying out the 1974 and the 1977 transactions.

Phoenix also argues that the decisions below "in effect" level a charge of confiscation against Ecuador, which Phoenix asserts is a matter for the executive branch and not the judiciary. (Cert. Pet., pp. 64-67.) Building on this erroneous characterization of the lower courts' opinions, Phoenix argues that the act of state doctrine, which is designed to prevent the judiciary from interfering with the executive function of making foreign policy, has been violated by the lower courts. (*Id.*)

Phoenix has offered no evidence—and there is none—that the district court's finding might adversely affect United States relations with Ecuador. Phoenix did not submit any evidence of concern by the State Department that a judicial determination of the issue of what the Government paid for might adversely affect relations between the United States and Ecuador. Indeed, the State Department, as Phoenix acknowledges, participated in and endorsed the 1977 transaction. (Cert. Pet., p. 66.) Moreover, the district court's finding that Ecuador owned the rights to produce in perpetuity and that the compensation it paid the Companies could only have been for investment is supported by the testimony of Ecuador's Minister of Natural Resources. (*See, e.g.*, A85-87.) Since the district court's determination that the Companies were paid only for their investment was in full accord with Ecuador's own view of its law, it could not possibly adversely affect American-Ecuadorian foreign relations.

Phoenix raises two other arguments that have nothing to do with the act of state doctrine, but also would have the effect of impeding the district court in carrying out its fact-finding function. Thus, Phoenix contends that the district court improperly

considered testimony of the Minister and his legal advisor in determining what the Government paid the Companies for. These witnesses participated directly in the 1974 transaction and played major roles in determining what the Government paid, and their testimony was highly probative on the issue. Phoenix's attempts to to exclude it are substantively without merit.

United States v. *U.S. Gypsum Co.*, 333 U.S. 364 (1948), upon which Phoenix principally relies, does not purport to set down a general rule of exclusion regarding oral testimony, and is factually inapposite here. The Court in *U.S. Gypsum* reviewed a determination by the district court to credit the cross-examination testimony of certain witnesses even though the testimony conflicted with the witnesses' direct testimony and with contemporaneous documents. 333 U.S. at 395-96. Under these circumstances, the Court held that the cross-examination testimony should be given "little weight." *Id.* at 396. In direct contrast, the direct testimony of the Minister and his legal advisor in this action does not conflict with their cross-examination testimony. Both Government officials testified consistently that the Government paid the Companies only for their investments and that it paid nothing for rights to produce. Nor does the testimony conflict with documentary evidence. The operative provisions of the decrees and regulation that Phoenix relies on, as demonstrated above, do not determine what the Government paid for. And, the phrase "rights and assets," which appears in recitals, was ambiguous as held by the district court. Thus, the testimony of the Minister and his legal advisor clarifies rather than conflicts with the documents relied on by Phoenix.

Phoenix also argues that the deposition testimony of the Minister and his legal advisor should not have been considered because "*post-hoc* statements of legislators have no probative value." (Cert. Pet., p. 54.) The authorities on which Phoenix relies question the utility of legislators' testimony only when it is offered as evidence of the meaning of legislation. Here, the witnesses were not called upon to explain the meaning of legislation. Their testimony was offered solely as proof that the Government intended to reimburse the Companies for their

investments, and the district court properly admitted and considered it for that purpose.

Plainly, what the Government paid for in connection with the 1974 and 1977 transactions is a fact question, and the Ecuadorian decrees and regulation and the other documents that Phoenix relies on are, at best, evidence bearing on its resolution. These enactments, together with the testimony of Ecuador's Minister of Natural Resources and his legal advisor, the amounts of the payments and how they were determined, the history of the Government's relationship with the Companies and other evidence bearing on the central fact issue of what the Government paid for, were part of the trial record. All of the foregoing evidence was properly considered by the district court when it found, as a matter of fact, that the Government reimbursed the Companies for their investments and did not pay for rights to produce oil.

CONCLUSION

For all the foregoing reasons, respondents respectfully submit that the petition should be denied.

Dated: September 26, 1988

Respectfully submitted,

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No. 88-158

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PHOENIX CANADA OIL COMPANY, LIMITED,

Plaintiff-Petitioner,

vs.

TEXACO PETROLEUM COMPANY, ECUADORIAN GULF OIL COMPANY and GULF OIL CORPORATION (Now, by change of name, CHEVRON U.S.A. INC.),

Defendants-Respondents,

– and –

TEXACO INC.,

Defendant.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S REPLY BRIEF

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ARGUMENT

Introduction

Defendants nowhere deny that the payment decrees and regulations are laws and acts of state, and that they relate to the 1974 and 1977 transactions. Defendants frankly admit they are "statements by the Government of what, in fact, it paid for" (Resp. Br. at 10). Given this, it was incumbent upon Defendants to provide some plausible explanation of the lower courts' inexplicable failure to address the decrees either in an Act of State Doctrine or Comity analysis. None has been offered.

Defendants' entire opposition rests upon their description of the important legal questions presented in the Petition as mere issues of fact. This is a serious error, and it does not withstand analysis.

Their argument that this case is not "special or important" enough to merit review in this Court because the decrees affect only certain specific transactions (Resp. Br. at 7-8) is meaningless. The same is true in virtually every act of state case.

(1) The Question of Law

Defendants argue that the payment decrees are merely evidentiary matter, no different from any other factual evidence, related to the "factual" question of what the government paid for. But laws are not mere factual evidence capable of being overridden by supposedly contrary testimony. Within the factual circumstances to which it applies, a law naturally prevails over other evidence.

This is not novel theory (See Resp. Br. at 10). The Act of State Doctrine

has long mandated that a foreign government's official act concerning the subject matter of a case cannot be questioned and must be accepted as a rule for the court's decision. Ricaud v. American Metal Co., 246 U.S. 304, 309 (1918). Such deference is particularly required in matters relating to a foreign government's regulation of its oil resources (Pet. at 48).

Defendants' proposition stands this axiom on its head. It places definitive official acts of a foreign government at the lowest rung of the evidentiary hierarchy, while the interested testimony of the parties, together with the testimony of former officials procured long afterward becomes supreme. Under this approach, plainly applicable laws can be cleverly avoided by a party able to produce enough such witnesses years later

to rewrite them through "clarification."

In contradiction to this bizarre theory, however, Defendants admit that Plaintiff's contract claim for continuing royalty payments was dismissed as a matter of law on the basis of Resolution 11927, a 1974 regulation. (See A241-A243) (Resp. Br. at 5 n.5). They thus acknowledge, and indeed insisted in the courts below, that a government act having the force of law prevails over factual evidence and controls the outcome. Having done that insofar as Resolution 11927 is concerned, they should not be heard to argue the opposite in regard to the payment decrees. Defendants' argument thus reveals itself for what it is: acceptance of the rule of law when it leads to a favorable outcome and avoidance of the law when it leads to an unfavorable outcome.

(2) The Purported Ambiguity

When ordering the trial, the District Court was considering the transfer agreements and little else (Pet. at 28-29). But contrary to Defendants' argument (Resp. Br. at 8 n.8), it was not the phrase "rights and assets" that was ambiguous. That phrase is clear. The ambiguity arose from the gap between that phrase and Defendants' claim that despite what the agreements clearly said, the government in the end paid only for equipment and not for rights (A259-260).

Notwithstanding the absence of any documentary support for this assertion (Pet. at 29-30), the District Court gave Defendants the benefit of the doubt and ordered the trial. But the Court very clearly left it open for Plaintiff to prove, either as a matter of fact or

law, that the payments, although calculated by reference to book value, were lump sum purchase prices for all of the consortium interests conveyed, including the oil production rights. (A260-261; A196-A197; A199-A200; Pet. at 29-30).

The reiteration of the "rights and assets" language in the payment decrees thus did not repeat any ambiguity. (See Resp. Br. at 8 n.8). It made clear that "rights and assets" were exactly what the government was paying for and showed that the purported ambiguity had been created by Defendants out of whole cloth. The payment decrees do not require "interpretation." They are clear. Once they were presented to the trial court, that should have resolved as a

matter of law any lingering issue of what was paid for.[1]

(3) The Issue of Validity

Defendants assert that they have not challenged the validity of the payment decrees or the government's authority to issue them (Resp. Br. at 10). Nevertheless they contend that unspecified provisions of Ecuadorian law forbade the payment for rights (Resp. Br. at 6 n.6, ¶ 4) and that the District Court placed great reliance on this. But by the latter contention, Defendants openly seek to justify the result below

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[1]Defendants err in asserting that the "rights and assets" language appears only in the "recitals" of Decree 666 and 1030 (Resp. Br. at 8 n.8). In fact, it appears in the first "operative" article of each of those decrees (A392, A397). In any event, it is wrong to argue that recitals have no meaning. The Court of Appeals found the recitals of Resolution 11927 to be very important (A20).

upon the theory, notwithstanding their contradictory protestation, that the payment decrees were illegal to the extent they provided that the payments were for rights. This lays bare the absurdity of their position and the error of the courts below. The payment decrees could not be illegal under Ecuadorian law; they were Ecuadorian law. Ecuadorian law did not prohibit payment for rights; it required it and defined the payments as being just that.

Defendants should not have been permitted on one hand to accept the validity of the decrees as laws, and then on the other to mount a back door effort to evade their impact by demoting them to mere "factual" evidence, procuring contradictory testimony and then arguing that the testimony takes precedence.

Because of the foregoing, the simple fact that the lower courts did not expressly declare the payment decrees to be invalid does not mean that the Act of State Doctrine is not implicated (Resp. Br. at 10). If courts may dispense with the Act of State doctrine in this sub silentio fashion, the doctrine itself is emasculated. The same, of course, is true for any rule of law.

(4) The Deposition Testimony

Plaintiff did not assert that United States v. U.S. Gypsum Co., 333 U.S. 364 (1948) lays down "a general rule of exclusion regarding oral testimony" (Resp. Br. at 12). It does contend that where oral testimony conflicts with contemporaneous documents -- in this case laws and other acts of state which define the payments as inclusive

of rights -- the contrary testimony is entitled to little or no weight.[2] Furthermore, since Defendants claim that the legislators were not called to explain the meaning of the laws in question (Resp. Br. at 12), then there was no reason whatsoever for the lower courts not to apply the clear terms of those laws.

(5) Foreign Relations

Defendants' argument that there was some requirement for Plaintiff to obtain a "Bernstein letter" from the State Department (Resp. Br. at 11) is wrong. The notion that the predilections of the State Department at any particular point

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[2]That testimony did not "clarify" the documents (Resp. Br. at 12). It attempted to amend them ten and twelve years after they were written by deleting the parts which expressly declared that the payments included rights.

in time can alter the constitutional demarcation between the respective roles of the executive and the judiciary has been rejected by a majority of the justices of this Court and is not the law. First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 776-77 (1972).

In referring by analogy to other allegedly "expropriatory" actions of the Ecuadorian government (Resp. Br. at 4), Defendants implicitly charge Ecuador with nothing less than an uncompensated confiscation of their contract rights. Thus, again despite their protestations to the contrary (Resp. Br. at 11), Defendants are in fact asking this Court to sustain the ruling below on just that basis. But, as the Petition points out, where the executive branch has negotiated with the foreign government and has

refrained from charging confiscation, Sabbatino warns the judiciary to refrain from making a determination to that effect (Pet. at 66).

Defendants' related argument that the lower courts' judgment cannot adversely affect U.S. foreign relations because it was "in full accord that Ecuador's own view of its law" (Resp. Br. at 11) has no basis. This statement is premised entirely upon Defendants' "political philosophy" argument. It is nothing less than an attempt to justify the lower courts' improper inquiry into the motivations underlying Ecuador's official acts and to attack the validity of payment decrees insofar as they declared the payments to be for rights.[3]

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[3]As shown in the Petition, and Defendants apparently do not challenge this, the result in this case could well have been different in the Second and Ninth Circuits, which, unlike the Third (continued...)

(6) Documents Reflecting Other Acts of State

Defendants' argument that the 1975 audit contract and the 1977 opinion of the Minister of Finance need not be considered because they are not laws again misstates the Act of State doctrine. A foreign government's pronouncement obviously does not have to be a law for it to have the force of an act of state.

Those other acts of state are highly relevant because they contain statements by Defendants constituting admissions together with evidence of the government's own clear understanding that the net book value formula resulted in a purchase price covering all of the

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[3](...continued)
Circuit, have repeatedly prohibited such inquiries (Pet. at 44-50).

consortium's interests, including contract rights. Clearly, this unbroken succession of official documents, capped by the specially enacted laws appropriating the monies and declaring what they were for, should have been conclusive in comparison to contradictory oral testimony procured so many years afterward.[4]

CONCLUSION

Defendants fail to refute the reasons shown in the Petition why the writ should be granted. The lower courts failed to apply relevant laws

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[4] In addition to the decrees and regulation, Plaintiff offered other contemporaneous evidence at trial, examples of which are included in the Appendix, proving that the payments were for rights as well as assets. (E.g., A372, A376, A380, A431, A459, A461, A465). The trial record also contained numerous contemporaneous admissions to this effect by Defendants themselves.

specifically enacted to control the transactions at issue. Their decisions have resulted in a grave miscarriage of justice. The writ should be granted.

Dated: New York, New York
October 7, 1988

Respectfully submitted,

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